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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF ALAMEDA, a municipal corporation,
Petitioner,

vs.

PREMIER COMMUNICATIONS NETWORK, INC.,
a California corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI AFTER JUDGMENT OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1. Are taxing agencies prohibited under *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev. (infra)* from applying a tax rate to a first amendment business unless the same tax rate (or method of computing the tax) applies to all other taxpayers?

TABLE OF CONTENTS

	Page
Questions presented for review	i
The opinion below	1
Grounds for jurisdiction	1
Constitutional and statutory provisions	1
Statement of the case	5
Argument	7
I	
Introduction	7
II	
The opinion creates tax loopholes not permitted by other provisions of the Constitution where no potential prior restraints justify that result	9
A. Introduction	9
B. Legislatures decide who shall bear the burden of taxation	9
C. The impact of the opinion below	11
D. No prior restraints result from the tax	11
III	
The court below has misapplied the Minneapolis Star holding	12
IV	
The court below confused and incorrectly applied standards of review for the First Amendment	16
A. Prior restraint should not be presumed here	16
B. The court below adopted a procedure which mandated the wrong result	17
Conclusion	21

TABLE OF AUTHORITIES CITED

Cases

Page

A. Magnano Co. v. Hamilton (1933) 292 U.S. 40, 54 S.Ct. 599 ..... 9, 10, 11

Bates v. State Bar of Arizona (1977) 433 U.S. 350, 97 S.Ct. 2691 17

Bunker Hill Associates v. City of Los Angeles (1982) 137 Cal.App.3d 79 10

Central Hudson Gas v. Public Service Com'n of N.Y. 1980 447 U.S. 557, 563, 100 S.Ct. 2343 17

Century Federal v. City of Palo Alto, Cal. (N.D.Ca. 1984) 579 F.Supp. 1553 17

City of Los Angeles v. Vincent (1984) ..... U.S. ....., 104 S.Ct. 2118 ..... 8, 17, 18, 19, 20, 21

City of New Orleans v. Dukes (1976) 427 U.S. 297, 96 S.Ct. 2513 9

Commonwealth Edison Co. v. Montana (1982) 453 U.S. 609, 101 S.Ct. 2946 9

F.C.C. v. National Citizens Com. for Broadcasting (1978) 436 U.S. 775, 98 S.Ct. 2096 17

Fox etc. Corp. v. City of Bakersfield (1950) 36 Cal.2d 136 10

Friedman v. Rogers (1979) 440 U.S. 1, 99 S.Ct. 887 17

Grosjean v. American Press Co. (1936) 297 U.S. 233, 56 S.Ct. 444 ..... 12, 14, 19, 21

Lehnhausen v. Lake Shore Auto Parts Co. (1973) 410 U.S. 356, 93 S.Ct. 1001 9

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev. (1983) 460 U.S. 575, 103 S.Ct. 1365 ..... 8, 12, 13, 14, 15, 18, 19, 21

Miranda v. State of Arizona (1966) 384 U.S. 436, 86 S.Ct. 1602 ..... 8, 16

Table of Authorities Cited

Cases

Page

Murdock v. Commonwealth of Pennsylvania (1943) 319 U.S. 105, 63 S.Ct. 870 ..... 12, 19

Ohralik v. Ohio State Bar Assn. (1978) 436 U.S. 447, 98 S.Ct. 1913 17

Pittsburgh v. Alco Park Corp. (1973) 417 U.S. 369, 94 S.Ct. 2291 ..... 10, 11

Red Lion Broadcasting v. F.C.C. (1969) 365 U.S. 367, 89 S.Ct. 1794 17

South Carolina v. Regan (1984) ..... U.S. ....., 104 S.Ct. 1107 16

Territory of Alaska v. Journal Printing Company (Alaska 1955) 135 F.Supp. 169 10

United States v. O'Brien (1968) 391 U.S. 367, 88 S.Ct. 1673 19

Web Service Co. v. Spencer (1967) 252 Cal.App.2d 827 10

Willingham Bus Lines, Inc. v. Municipal Court (1967) 66 Cal.2d 893 10

Constitution

United States Constitution:

First Amendment 13, 17, 18, 21

Fourteenth Amendment 1

Statutes

Government Code, Section 53066 12

28 U.S.C. Section 1257 1

47 CFR 76.31 12

Miscellaneous

City of Alameda Ordinance, No. 1991 ..... 2, 3, 4, 6, 7

36 FCC 2d 143 11

61 FCC 2d 452 12

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PETITION FOR WRIT OF CERTIORARI AFTER JUDGMENT OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE OF THE STATE OF CALIFORNIA

Petitioners pray that a writ of certiorari be issued to the Court of Appeal, First Appellate District, Division One of the State of California to review this case after judgment.

THE OPINION BELOW

The opinion of the Court of Appeal of the State of California, reported in 156 Cal.App.3d 148, its denial of a rehearing and a denial of the petition for hearing to the California Supreme Court are attached hereto as Appendix A.

GROUNDS FOR JURISDICTION

The opinion and judgment of the Court of Appeal was filed on May 22, 1984. Rehearing was denied on June 21, 1984. Hearing in the California Supreme Court was denied on August 15, 1984. (Appendix A).

This Court has jurisdiction under 28 U.S.C. 1257 to hear the case by writ of certiorari. The court below held that the ordinance in question was repugnant to the federal constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment XIV of the Constitution of the United States:

> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment I of the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise there-

of; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Ordinance No. 1991 N.S. of the City of Alameda, California:

CITY OF ALAMEDA ORDINANCE NO. 1991
New Series
AMENDING THE BUSINESS LICENSE TAX OF THE CITY OF ALAMEDA

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALAMEDA that:

Section 1. The Alameda Municipal Code is hereby amended by adding Section 13-111(s) to Article 1 and Sections 13-1951 and 13-1952 to Article 9 of Chapter 1, Title XIII, thereof, to read as follows:

Sec. 13-111. (s) Television Subscription Service. "Television subscription service" shall mean a business that sells rights to or subscriptions for the receipt of television signals not available by use of standard antennae. Television subscription service includes, but is not limited to, community antenna systems or other antenna systems required to receive satellite signals or any signal which requires the use of a specific antenna or decoding or unscrambling device.

Sec. 13-1951. Television Subscription Service.

(a) Every person conducting a television subscription service business shall pay an annual license fee based upon three percent (3%) of the gross receipts of Alameda subscription sales or fees for the previous year, as defined by Section 13-1104, except that the first year's fee shall be three percent (3%) of subscription fees payable thirty (30) days after the subscription is paid.

(b) In the event that state or federal law preempts the amount chargeable as a tax or franchise fee said annual license fee shall be the maximum allowed under state or federal law not in excess of subsection (a).

(c) No license may be issued under this Chapter for television subscription service if the City Council may lawfully require a franchise agreement between the television subscription service operator and the City until such agreement is executed.

Sec. 13-1952. Emergency Communications Systems. Every person conducting the business of providing fire or police or other emergency communications systems or alarms shall pay the annual license fee set forth for television subscription service (Sec. 13-1951). Persons providing both television subscription service and services hereunder may combine their sales and pay the tax on all receipts under either this Section or Section 13-1951.

Section 2. The Alameda Municipal Code is hereby amended by amending Section 13-1102 of Article 10, Chapter 1, of Title XIII thereof, to read as follows:

Sec. 13-1102. Excluded. Persons required to pay license fees under Sections 13-195, 13-195.1, 13-197, 13-1913, 13-1919, 13-1920, 13-1922, 13-1931, 13-1938, 13-1951, and 13-1952 and persons with no previous years' gross receipts shall not pay in lieu fees under this article.

Section 3. Purpose. This ordinance is adopted for revenue purposes only. Only local subscription sales shall be taxed and no regulatory measures unrelated to solicitations are implied herein.

Section 4. This ordinance provides for a tax levy for the usual and current expenses of the City and shall be in full force and effect immediately upon final passage, pursuant to Section 3-11 of the Charter of the City of Alameda.

/s/ C. J. CORICA
Presiding Officer of the Council

Attest:

/s/ Deen Speegle
City Clerk

* * * * * *

I, the undersigned, hereby certify that the foregoing Ordinance was duly and regularly adopted and passed by the Council of the City of Alameda in regular meeting assembled on the 4th day of December, 1979, by the following vote, to wit:

AYES: Councilmen Diament, Stone, Tillman, and President Corica—(4)

NOES: Councilman Sherratt—(1)

ABSENT: None

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said City this 5th day of December 1979.

/s/ DEEN SPEEGLE
City Clerk of the City of Alameda

STATEMENT OF THE CASE

Petitioner, City of Alameda, (hereinafter "City") employs a business license tax as a revenue raising measure. All persons doing business in the City are covered by the tax. Just before it issued a cable television franchise (for the first time) the City amended the business license tax chapter of its Code by establishing a new classification for this most recent business—pay television. There are two kinds of pay television: cable providers (CATV) which operate under City franchise, and off-the-air (MDS) systems, which use microwave transmitters and decoding antennae devices. Respondent ("Premier") is the latter. It started business in Alameda about a year before the new classification was adopted.

Premier refused to pay the business license tax. City filed suit. Premier contended by way of answer and cross-complaint that the ordinance violated, among other things, the First Amendment of the Federal Constitution. (Appendix B). Just prior to trial this Court decided *Minneapolis Star (infra)*. Cross motions for judgment on the pleadings were filed. Premier's motion was granted on the basis that the ordinance violated first amendment rights. (Appendix C). The Court of Appeal heard and decided the case entirely on first amendment grounds. (Appendix A).

The decision of the California Court of Appeal became final when the California Supreme Court refused to hear it. (Appendix A). The federal question was raised and adjudicated at every stage of the proceedings. The federal question is substantial and the decision is not based on state grounds.

The record discloses the following undisputed facts. Premier sells television programming consisting of movies and sports events throughout the Bay Area. It transmits these programs from Berkeley, California and has its business office in Burlingame, California. Its activities in the

other Bay Area cities, including Alameda, consist of executing subscription agreements and the installation of an antenna which permits the user to receive Premier's off-the-air signal. The signal cannot be received without this decoding device which Premier leases to its customers. This equipment is maintained by Premier and serviced in Alameda.

City adopted Ordinance No. 1991 N.S., effective December 4, 1979, *supra*. The ordinance amended that Chapter of the Municipal Code containing the business license provisions by adding the sections at issue here. (Appendix D).[1] The tax rate for pay television thereunder is three percent (3%) of gross revenues. These provisions "constitute a tax for municipal revenue purposes only, and are not regulatory fees." Sec. 13-133. (Appendix D, p. 9).

The business license tax employs flat rates, unit rates (number of employees, rooms, seats, etc.) and gross receipts as methods of computing the tax. Most taxpayers are permitted an in lieu tax rate based on gross receipts. Sec. 13-1101. (Appendix D, p. 49). Given the rates of the in lieu tax (Sec. 13-1105) a business would have to be very poor for the in lieu tax liability to be lower than the flat or unit tax liabilities. (Appendix D, p. 54). Not all taxpayers are permitted the in lieu tax rate. Drive-in theaters and outdoor advertisers, e.g., are taxed on gross receipts only (Secs. 13-1938 and 13-195) and therefore are not permitted the in lieu option (Sec. 13-1102). (Appendix D, p. 41, p. 20 and p. 49). Like outdoor advertisers, the subscription television tax is based solely on gross receipts.[2] Offering an in lieu (lower rate) would simply nullify any other rate.

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[1]All City ordinance section numbers referred to herein are set forth in Appendix D.

[2]Outdoor advertisers pay a minimum of 2% on their gross revenues ($300 is 2% of $15,000) and a maximum of 1.2% on gross revenues of $75,000 ($900 is 1.2% of $75,000). They never pay less than ½% ($150 is ½% of $30,000) plus $900. Sec. 13-195. (Appendix D, p. 20).

There are several classes of taxpayers that pay relatively higher flat rates for short term uses that are also not permitted the gross receipts option. Advertising vehicles pay $75, Sec. 13-196 (Appendix D, p. 21), amusement parks pay $75 or $65 for each device, Sec. 13-197, (Appendix D, p. 22), boxing and wrestling exhibits pay $150 quarterly, (Sec. 13-1913), handbill distributors pay $120 (Sec. 13-1919), herb dealers pay $75 or $225 (Sec. 13-1920), hotels and apartments pay $4 per room (Sec. 13-1922) and dance halls pay $15 to $60 (Sec. 13-1931). (Appendix D, p. 25, p. 28, p. 30, and p. 36).

City ultimately decided to franchise CATV, rather than merely collect a business license tax. The franchise fee is also three percent (3%) of gross revenues. Section 16(a) of the Franchise Ordinance (Appendix E, p. 3). To avoid a double contribution to the general fund the Enabling Ordinance provides that the franchise fee "shall be in lieu of" the business license tax "to the extent" actually paid. Section 12.1 (F). (Appendix F, p. 5). The trial court determined that the tax did not apply to CATV, or in the alternative, that the credit mechanism also constituted differential treatment. (Appendix C). The Court of Appeal ignored these two erroneous interpretations of the ordinances and decided the case on the basis of differential tax rates shown on the face of the ordinance. (Appendix A).

ARGUMENT

I

INTRODUCTION

The court below has, for the first time in American jurisprudence, applied the First Amendment to invalidate a tax rate. It has decided, for the first time, the facial validity of a tax by comparing the tax liabilities of all the entities subject to a generally applicable *nexus* of taxation: here, the City's business license tax. The court below held that the business license tax could not be applied to a particular taxpayer by reason of the fact that

taxpayer's tax liability exceeded the liability of other taxpayers who were not within the same *rate* classifications as Premier under the business license tax. The lower court's analysis and holding prevent the application of anything but uniform tax rates to first amendment businesses, and its "differentially burdensome" rationale can be applied to financial burdens imposed upon first amendment users by means other than taxation. Premier's attornies are already contending in another action that this case prohibits the imposition of franchise fees against cable television companies. Under this holding all kinds of first amendment claimants, lawyers, public relations firms, consultants, may claim that their business license tax cannot exceed any other business license taxpayers' liability.

Certainly, tax rates are not always uniform. The question is one of general importance which has not been decided by any other court. The court below relied on *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.* (1983) 460 U.S. 575, 103 S.Ct. 1365. While purporting to only find the tax invalid as applied to Premier the court below actually held the tax invalid on its face and announced a new rule that government must create comparable tax liabilities for all taxpayers if it wishes to tax any first amendment business. As we shall demonstrate, this is an unwarranted extension of the rule announced in *Minneapolis Star*. Certiorari should be granted to "further explore some facets of the problem, thus exposed" by *Minneapolis Star. Miranda v. State of Arizona* (1966) 384 U.S. 436, 441-442, 86 S.Ct. 1602, 1610-1611.

The court below also applied a standard of review inconsistent with this Court's most recent opinion on that subject in *City of Los Angeles v. Vincent* (1984) ..... U.S. ....., 104 S.Ct. 2118.

II

THE OPINION CREATES TAX LOOPHOLES NOT PERMITTED BY OTHER PROVISIONS OF THE CONSTITUTION WHERE NO POTENTIAL PRIOR RESTRAINTS JUSTIFY THAT RESULT

A. Introduction

First, some general principles will show how the rule announced by the court below radically undermines the doctrine of separation of powers in tax matters. Historically, the First Amendment has had very little impact on taxation. The opinion overrules (*sub silentio*) Equal Protection and Due Process doctrines never questioned in our history.

B. Legislatures Decide Who Shall Bear the Burden of Taxation

Relative burdens and degrees of taxation have always been political questions. Tax *rates* have been virtually unassailable in the courts. "Revenue taxes" need not relate to "value of services provided a taxpayer." *Commonwealth Edison Co. v. Montana* (1982) 453 U.S. 609, 622, 101 S.Ct. 2946, 2956. Only "palpable arbitrary" or "invidious" classifications violate Equal Protection even where "the collateral effect of restricting or even destroying an occupation or a business" may result from its application. *Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S. 356, 360, 93 S.Ct. 1001, 1004. The court below found, as the constitutional fact relied on, that the tax in question discriminated against Premier. Under Equal Protection immensely greater degrees of "discrimination" are left to "the wisdom of" the people's representatives or "legislative policy determinations" in the "local economic sphere." *See, City of New Orleans v. Dukes* (1976) 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2517. *See,* for example, *A. Magnano Co. v.*

Hamilton (1933) 292 U.S. 40, 54 S.Ct. 599 and *Pittsburgh v. Alco Park Corp.* (1973) 417 U.S. 369, 94 S.Ct. 2291.[3]

In the Due Process area the same principle applies. Only in extreme situations will the court interfere with legislative determinations of who shall bear the burden of taxation. Due Process applies only where the tax is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes in substance and effect, the direct exertion of a different and forbidden power, as for example, the confiscation of property." *Magnano,* at p. 44 (S.Ct. p. 601). Significant gross receipt taxes on newspapers have been upheld. *Territory of Alaska v. Journal Printing Company* (Alaska 1955) 135 F.Supp. 169 (and cases cited therein).

"The premise that a tax is invalid if so excessive as to bring about the destruction of a particular business (has been uniformly rejected)." *Pittsburgh v. Alcoa Park Corp., supra,* at p. 374 (S.Ct. 2295). This Court's attitude concerning the *amount* of taxes is succinctly summarized in *Magnano.*

> "If the tax imposed had been 5 cents instead of 15 cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise, which, standing alone, this court heretofore

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[3]California cases are clear on the point as well. *Fox etc. Corp. v. City of Bakersfield* (1950) 36 Cal.2d 136, 142; *Web Service Co. v. Spencer* (1967) 252 Cal.App.2d 827, 833 and *Bunker Hill Associates v. City of Los Angeles* (1982) 137 Cal.App.3d 79. Different methods of computing a tax was specifically approved in *Willingham Bus Lines, Inc. v. Municipal Court* (1967) 66 Cal.2d 893.

has uniformly rejected as furnishing no juridical ground for striking down a taxing act." *Id.* at p. 47 (S.Ct. 602).

C. The Impact of the Opinion Below

Because the opinion, in fact, equates differential treatment with discrimination, based on the dollar amounts required of different taxpayers, all the law cited above has been reversed for anyone who can claim the now coveted status of a first amendment business. In short, the opinion has created a new tax loophole. Among other things, margarine can be treated differently than butter (*Magnano*) and municipal parking lots can be distinguished from private parking lots (*Pittsburgh*), but pay television must enjoy the lowest tax rate applicable under the form of taxation (here, a business license) applied. No bench mark or test to determine the limit of "discrimination" can be found or is even inherent in the absolute nature of the opinion. For example, if the City were to place Premier's business in the same category as outdoor advertisers, it appears from the the lower court's analysis of the facts that the tax would then be invalid as to both Premier and the advertisers because those businesses would be paying *at least* two and one-half times more tax than many others. *See,* footnote 6 of the opinion. (Appendix A). By a process of elimination the City would find itself in a position where it could only apply the same tax rate to everyone or apply the lowest rate to the panoply of first amendment claimants in order to tax a first amendment business at all.

D. No Prior Restraints Result From the Tax

The tax will not *in fact* inhibit Premier's business.[4] It amounts to a few cents per customer per month. The FCC, which views cable television franchise fees as a "regressive tax" (36 FCC 2d 143, 209), approves a charge as high as

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[4]In any case there is no record on that point.

five percent (5%), which it raised to that amount after noting a "robust growth" of the industry (66 FCC 2d 380, 402).[5] 47 CFR 76.31. Premier sells essentially the same programming as cable television. The State of California has also sanctioned fees as high as five percent (5%) for CATV pay television. Gov. Code § 53066.

III

THE COURT BELOW HAS MISAPPLIED THE MINNEAPOLIS STAR HOLDING

The anomalies created by the opinion result from assimilating concepts based on discriminatory treatment to concepts applicable to prior restraints. The First Amendment is rarely, and only indirectly, concerned with discrimination. In previous first amendment tax cases this Court addressed direct taxation of the exercise of speech (*Murdock v. Commonwealth of Pennsylvania* (1943) 319 U.S. 105, 63 S.Ct. 870) and a tax which, by virtue of an exemption based on circulation, directly discriminated against large newspapers vis-a-vis small newspapers (*Grosjean v. American Press Co.* (1936) 297 U.S. 233, 56 S.Ct. 444). Neither of those cases suggests that differences in tax rates may create prior restraints.

Minneapolis Star held that special and unique taxes imposed on first amendment disseminators, as a matter of law, raise the potential for prior restraints. "Special" and "unique" refer to a taxable event or *nexus* not employed to tax others. The analysis of these factors did not refer to tax rates or ultimate tax liability (in dollars). A cursory comparison of the two opinions makes the point. "Minnesota, however, has not chosen to apply its sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications." *Minneapolis Star,*

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[5]The FCC has also issued a certificate approving a franchise agreement where a 5% business license tax was employed. 61 FCC 2d 452.

supra, 103 S.Ct. at 1370. The "ordinary rule in Minnesota" is "to tax only the ultimate, or retail sale rather than the use of components like ink and paper." *Id.*, at p. 1370. The issue is stated as:

> "By creating this special tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We must determine whether the First Amendment permits such special taxation. A tax that [so] *burdens* rights protected by the First Amendment cannot stand unless the *burden* is necessary to achieve an overriding governmental interest." *Id.*, at pp. 1370-1371. (emphasis added)

The term "differential treatment" there references a tax which applied to *no* other form of doing business. In *Minneapolis Star* only the press was taxed on the basis of that particular taxable event—a "use tax" on purchase of components for the manufacture of their product. This Court eschewed the dissent's observation that the tax liability (the dollar amount) might *actually be lower* for the taxpayer because the "burden" found by the majority was *not* the tax liability.[6] "We would be hesitant to fashion a rule that automatically allowed the state to single out the press for a different *method* of taxation as long as the *effective* burden was no different from that on other taxpayers or the [effective] burden on the press was lighter than that on other businesses." *Id.*, at p. 1374 (emphasis added). The Court draws a clear distinction between the "burden" imposed (on the exercise of the First Amendment) by a unique taxing method (*nexus* or event) and the burden of a tax liability ("effective burden" or actual dollar amount), which this Court made clear is not proscribed by the First Amendment.

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[6]In the context of *Minneapolis Star*, "burden" refers to a burden on the *exercise of the First Amendment*, not tax liability *per se*. The court below changed the semantics of the word completely.

In *Minneapolis Star*, this Court merely extended the rule in *Grosjean*. The Court added to the prohibition against classifying members of the press differentially (by use of an exemption based on circulation) a prohibition against classifying any members of the press differentially by use of [a taxable *nexus* not applicable to *any other* taxpayer.][7] The tax liability resulting from such a classification was held irrelevant. The Court found the tax facially invalid because of its potential for prior restraint.

The court below improperly summarizes *Minneapolis Star* by stating:

> "The Court reasoned that the state's interest in requiring the press to bear its *share of the tax burden* could be achieved by taxing the press *equally* with others, thus avoiding differential tax treatment in accomplishing its revenue generating objectives." (emphasis added) (Appendix A, at p. 12).

Therefore, the court below finds, as a constitutional fact from the face of the ordinance, a "differentially burdensome" tax.[8] (Appendix A, at p. 13). The court below analyzed differences in tax *liabilities*. This Court analyzed different methods of *imposing* a tax.

As an alternative rationale the court below used the inapplicability of the in lieu tax *rate* (potentially different tax liability) as a ground for finding differentially burdensome treatment. (Appendix A, at p. 16). The analysis used below is precisely the analysis suggested by Justice Rehnquist in his dissent and rejected by this Court. The only difference is the fortuitous circumstance that the tax *liability* here may be higher, rather than lower. The court below converted this Court's absolute ban on the use of

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[7]The court below turned the bracketed portion of this sentence into [a *rate* not applicable to *every* tax payer].

[8]This Court never used that terminology.

different taxable events (or *nexus*) to a ban on different tax liabilities.[9]

Grammar does not serve logic when applied out of context. One can say that differential treatment occurs whenever the press is not treated "equally", but the statement means nothing unless we know how the press must be treated equally. The *basis* for taxation, not tax liability, provides the context. *Minneapolis Star* is distinguishable and inapplicable in this case.

Requirements such as obtaining permits (e.g., parade), or *regulator* licenses (e.g., vendors), and provisions which permit arrest (of speakers) or seizure (of materials) without prior judicial determinations (e.g., obscenity) meet the test of a prior restraint. A general revenue tax does not. "It is beyond dispute that (governments) can subject newspapers to generally applicable economic regulations without creating constitutional problems." *Id.*, at pp. 1369-1370. A tax based on a discriminatory *nexus* (applicable to no one else) "suggests that the goal is not unrelated to suppression of expression" and therefore also qualifies. *Id.*, at p. 1372. A presumption that a difference in tax rates might be related to the suppression of expression has never existed before. The danger inherent in *Minneapolis Star* is an interpretation that it requires no actual or even likely prior restraint. The language of the opinion could be, as it was by the court below, misread that way. *See* e.g., footnote 9. Under the decision below, *Minneapolis Star* threatens to do to the First Amendment what *Miranda* did to the Fifth Amendment. As the court below read it,

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[9]"In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment." *Id.* at p. 1375. The "proposed rule" was an argument by the State that the tax was valid as a substitute for a tax of general applicability as long as the actual tax liability did not exceed what it would be under the general tax. The court rejects here any justification for a unique tax *nexus* and also rejects analysis of tax liabilities.

a prior restraint will be *assumed* whenever any other taxpayer pays less, regardless of the lack of significant impact of the amount of the tax on the taxpayer.[10]

IV

THE COURT BELOW CONFUSED AND INCORRECTLY APPLIED STANDARDS OF REVIEW FOR THE FIRST AMENDMENT

A. Prior Restraint Should Not Be Presumed Here

At times, courts have fashioned procedures for review, such as standards for who shall carry a particular burden of proof, to decide cases which, for reasons of public policy, do not appear amenable to the usual fact finding process. The court below prematurely shifted the burden of proof to the City. "Differential treatment" was literally applied by the court below out of context to create a new doctrine of "differentially burdensome" treatment. Justice Stevens recently discussed the use of such "seductive *cliches*" as "constitutional mandates" in *South Carolina v. Regan* (1984) ..... U.S. ....., 104 S.Ct. 1107, 1131, at n. 7. (Concurring and dissenting opinion of Justice Stevens.) We believe the opinion below and its analysis of the term "differential treatment" creates the same kind of "pernicious abstraction" dealt with summarily there. The unintended consequences of the mechanical application of the rubric created by the court below are shocking. Virtually anything, short of absolute uniformity, is "differentially burdensome."

The court below also found that Premier engaged in a first amendment business. That alone does not invoke the analytical framework applied in the opinion. It is a "fundamental proposition that there is no 'unabridged First Amendment right to broadcast comparable to the right of

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[10]An analogy may be drawn to the *Miranda* approach where evidence is not stricken on the basis of its unreliability or unfairness, but instead to protect the integrity of the Constitution.

every individual to speak, write or publish'." *F.C.C. v. National Citizens Com. for Broadcasting* (1978) 436 U.S. 775, 799, 98 S.Ct. 2096, 2114. The rights of broadcasters are not as great as the rights of the general public. *Red Lion Broadcasting v. F.C.C.* (1969) 365 U.S. 367, 89 S.Ct. 1794. The First Amendment does not provide a talisman against the usual burdens of government. This court is flexible in weighing the interests involved in this case. In the commercial speech area, e.g., overbreadth (the heart of many regulatory cases) does not apply. *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691 and *Friedman v. Rogers* (1979) 440 U.S. 1, 99 S.Ct. 887. This Court does not treat those regulatory cases on a "par" with other regulatory cases. *Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 456, 98 S.Ct. 1913, 1918. Pay television is not the same thing as newspapers.[11] A "lesser" degree of protection may be afforded different interests. *Central Hudson Gas v. Public Service Com'n of N.Y.* (1980) 447 U.S. 557, 563, 100 S.Ct. 2343, 2350. Indeed, an all or nothing approach promotes a "devitalization" or "dilution" of the First Amendment. *Ohralik*, at p. 456 (S.Ct. p. 1918).

B. The Court Below Adopted a Procedure Which Mandated the Wrong Result

The incorrect procedure used below has just been analyzed and disapproved by this Court in *City of Los Angeles v. Vincent, supra*. This Court made it clear that it will circumspectly apply analysis of constitutional facts requiring shifting of the burden of proof in First Amendment cases. In *Vincent* this Court held that a total ban on posting signs on public property was valid. The public purposes supporting the ordinance were aesthetic (freedom from sign clutter) and traffic safety. The Court of Appeal had required

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[11]The court below assumes the opposite, but in fact the matter is still being debated by other courts. *See, Century Federal v. City of Palo Alto, Cal.* (N.D.Ca. 1984) 579 F.Supp. 1553, 1562.

the city to prove that it was conducting a comprehensive program against visual blight which would justify application of the ordinance to the plaintiff (a political sign company), the implication being that anything less would discriminate against a first amendment business. The Court of Appeal also rejected the traffic safety justification because something less than a total ban could be adopted to serve those ends. This Court's opinion in *Vincent* makes it clear that the Court of Appeal was incorrect in treating the ordinance as presumptively invalid because the First Amendment was involved. "But to say the ordinance presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation.*" *Id.*, 104 S.Ct. 2128. The Court of Appeal, rather than searching the record for the constitutional facts necessary to invoke the First Amendment and shift the burden of proof, had shifted the burden of proof, in the first instance, and required the city to justify the ordinance by proving that nothing else but the total ban could serve the city's purposes. Under the analysis of *Vincent,* the ordinance should not have been treated as facially invalid or overbroad in the first place.

Here, the court below has applied the facially invalid approach to hold an ordinance invalid *as applied.* Because Premier markets a speech product the court required the City to prove that it cannot achieve its goal (tax revenue) some other way. The court justified the imposition of this obviously impossible burden of proof by equating "differentially burdensome" treatment with different tax *liabilities* instead of "special" or "unique" taxable events. The court then held the tax invalid *as applied to Premier's first amendment business* only. But in fact, the court holds the ordinance invalid on its face.[12] Its attempt to pretend otherwise will create considerable confusion in the future.

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[12]Under *Minneapolis Star* a special or unique tax could *never* be valid as applied.

If the court below were, in fact, to consider the ordinance as applied it would have to reverse itself or at least remand. The determination of the FCC and State of California in relation to other forms of pay television leaves no question that the ordinance is valid as applied. Moreover, the "framework for reviewing a viewpoint [content] neutral [enactment]" (as all taxes are), is *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673 (cited in *Vincent* at 104 S.Ct. 2129).[13] A tax necessarily meets the first two tests of *O'Brien*.[14] A revenue measure meets the third test unless it applies directly to speaking activities *(Murdock)*, discriminately applies to speakers within the same media (*Grosjean*) or applies facially only to businesses engaged in speech (*Minneapolis Star*).[15] The court below used the latter case and a literal application of the fourth test to justify a presumption that differential tax rates are also related somehow to the suppression of expression. We have already pointed out why *Minneapolis Star* does not apply. A literal application of the fourth test would invalidate, as the court below did, all differences in *tax liabilities* since someone else can *always* be taxed instead. But this Court did not literally apply the fourth test in *Vincent*. It in fact gave

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[13]*O'Brien* was cited in *Minneapolis Star* also as setting forth the test where balancing interests are appropriate. 103 S.Ct. at 1372, n. 7. The opinion went on to hold the Minnesota statute invalid on its face, however. We find *O'Brien* inappropriate in tax cases, with the possible exception of the third test. The third test is not unlike the due process "confiscatory" test which we believe along with the Equal Protection Clause provides adequate protection in the area of tax rates. *See,* Paragraph II, *supra.*

[14]"[A] government regulation is sufficiently justified if it is (1) within the constitutional power of the government; (2) if it furthers important or substantial government interests; (3) if the government interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest." at p. 377 (S.Ct. 1679).

[15]In our opinion this is the *ratio decidendi* for *Minneapolis Star.*

the city considerable latitude to show that a total ban "responds precisely to the substantive problem which legitimately concerns the city." *Id.*, at p. 2131. The *Vincent* court refused to compare other forms of clutter with the one addressed by the ordinance before it. *Id.*, at p. 2131.[16] Similarly, this Court should not compare the tax *rates* of others to determine whether a prior restraint exists when the ordinance is applied to Premier. The "as applied" decision of the court below relates to tax *liability*. Is the resulting tax liability (3%) a prior restraint? The experts in the field (FCC) think not. No record exists to go behind the ordinance. Under the opinion below, although the tax liability is reasonable, it can never exceed the tax liability of others, even where the taxable event (*nexus*) is the same. The opinion creates, by virtue of an incorrect syllogism slavishly applied, the doctrine of equal taxation.

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[16]There is, of course, no record on the point here because the trial court decided the case on judgment on the pleadings. The City's inability to tax Premier by any other means (it having no *nexus* other than doing business in the City) while other businesses receiving the same services pay other taxes (property and sales) as well as the business license tax, creates a tax inequity which the higher rate for Premier's kind of business addresses. However, given the facially modest rate and the FCC's position on fees and taxes, the City should not have to prove a need for the higher rate because that kind of "burden" invokes no prior restraint under settled constitutional theory.

CONCLUSION

In recent years this Court has been expanding the First Amendment in ways that an earlier court expanded the Fourth and Fifth Amendments. However, each new branch of this Court's first amendment doctrines has been pruned back as soon as attempts were made to extend it too far. The commercial speech cases and *Vincent* cited herein demonstrate that point. *Minneapolis Star* may be considered by some as the First Amendment equivalent of a *Miranda* decision because it may be invoked when the mere possibility of a prior restraint appears, without any indication that a prior restraint will actually or likely occur. Given *Grosjean* and the facts of *Minneapolis Star,* we find no reason to argue with the holding on the Minnesota use tax, but this case demonstrates the extent to which this Court's preventative language can achieve unreasonable results. Further clarification is therefore required.

Respectfully submitted,

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Attorney for Petitioner

FILED
OCT 12 1984
ALEXANDER L. STEVAS
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF ALAMEDA, a municipal corporation,
Petitioner,

vs.

PREMIER COMMUNICATIONS NETWORK, INC.,
a California corporation,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI AFTER JUDGMENT OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE OF THE STATE OF CALIFORNIA

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113pp

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE

OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CITY OF ALAMEDA,

Plaintiff and Appellant, A023536

v. (Alameda County Sup.Ct.No. 536851-8)

PREMIER COMMUNICATIONS NETWORK, INC.,

Defendant and Respondent./

The City of Alameda (City) appeals from a judgment (1) awarding Premier Communications Network, Inc., (Premier) a judgment on the pleadings, and (2) declaring City's Ordinance No. 1991, which imposed a tax upon "television subscription service" businesses, unconstitutional under the First Amendment to the United States Constitution and article I, section 2, of the California Constitution, and enjoining enforcement of the ordinance.

Ordinance No. 1991,[1/] enacted on December 4, 1979, amended the portion of the City's municipal code dealing with business licenses, by imposing a business license tax of 3 percent of annual gross receipts upon "(e)very person conducting a television subscription service business" and upon businesses providing emergency communications systems or alarms.

1/ The full text of ORDINANCE No. 1991 provides as follows:

"Section 1. The Alameda Municipal Code is hereby amended by adding Section 13-111(s) to Article 1 and Sections 13-1951 and 13-1952 to Article 9 of Chapter 1, Title XIII, thereof, to read as follows:

"Sec. 13-111(s). Television Subscription Service.

"Television subscription service" shall mean a business that sells rights to or subscriptions for the receipt of television signals not available by use of standard antennae. Television subscription service includes, but is not limited to, community antenna systems or other antenna systems required to receive satellite signals or any signal which requires the use of a specific antenna or decoding or unscrambling device.

"Sec. 13-1951. Television Subscription Service.

(Cont'd on next pg.)

City alleged in an amended complaint that Premier was engaged in the television subscription service business in the City,

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(Fn. 1 cont'd.)

"(a) Every person conducting a television subscription service business shall pay an annual license fee based upon three percent (3%) of the gross receipts of Alameda subscription sales or fees for the previous year, as defined by Section 13-1104, except that the first year's fee shall be three percent (3%) of subscription fees payable thirty (30) days after the subscription is paid.

"(b) In the event that state or federal law preempts the amount chargeable as a tax or franchise fee said annual license fee shall be the maximum allowed under state or federal law not in excess of subsection (a).

"(c) No license may be issued under this Chapter for television subscription service if the City Council may lawfully require a franchise agreement between the television subscription service operator and the City until such agreement is executed.

"Sec. 13-1952. Emergency Communications Systems.

"Every person conducting the business of providing fire or police or other emergency communications systems or alarms shall pay the annual license fee set forth for television subscription service (Sec. 13-1951). Persons providing both television subscription service and

(Cont'd on next pg.)

under the name "Home Box Office", and had failed to pay the business license fee required by Ordinance No. 1991. It sought

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(Fn. 1 cont'd.)

services hereunder may combine their sales and pay the tax on all receipts under either this Section or Section 13-1951.

"Section 2. The Alameda Municipal Code is hereby amended by amending Section 13-1102 of Article 10, Chapter 1, of Title XIII thereof, to read as follows:

"Sec. 13-1102. Excluded.

"Persons required to pay license fees under Sections 13-195, 13-195.5, 13-197, 13-1913, 13-1919, 13-1920, 13-1922, 13-1931, 13-1938, 13-1951, and 13-1952 and persons with no previous years' gross receipts shall not pay in lieu fees under this article.

"Section 3. Purpose. This ordinance is adopted for revenue purposes only. Only local subscription sales shall be taxed and no regulatory measures unrelated to solicitations are implied herein.

"Section 4. This ordinance provides for a tax levy for the usual and current expenses of the City and shall be in full force and effect immediately upon final passage, pursuant to Section 3-11 of the Charter of the City of Alameda."

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to recover 3 percent of Premier's gross receipts derived from its business in the City for the fiscal year 1979-1980 and each fiscal year thereafter. In responsive pleadings, Premier admitted nonpayment and denied liability on the ground that the tax violated the constitutional guaranties of free speech and press, and cross-complained to enjoin enforcement of Ordinance No. 1991 on the theory that the ordinance was unconstitutional and void as applied to Premier. City's answer generally denied the cross-complaint's charging allegations.

At the commencement of trial, on April 21, 1983, the court granted Premier's motion for judgment on the pleadings on the ground that Ordinance No. 1991 violated the First Amendment to the United States Constition and entered a judgment declaring the ordinance unconstitutional and enjoining

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its enforcement.[2/] This appeal followed.

Premier is a multipoint distribution service, headquartered in Burlingame, California, which operates under the name "Home Box Office". It receives signals transmitted from outside the state by satellite at a location in the City of Berkeley and retransmits those signals by microwave to its subscription customers in Bay Area cities, including the City of Alameda. Premier's customers receive the microwave signals through an antenna leased from Premier for viewing via conventional television receivers, which includes recently released motion pictures, specially produced programs, sports events, and other entertainment and news programs.

2/ The court's "order re judgment and injunction" setting forth its conclusion that Ordinance No. 1991 unconstitutionally infringed rights guaranteed by the First Amendment to the United States Constitution and article I, Section 2, of the California Constitution embraced the same legal issue raised by Premier's motion for judgment on the pleadings and by its cross-complaint.

The First Amendment prohibits the enactment of any law "abridging the freedom of speech, or of the press . . . ," and is applicable to state and municipal action pursuant to the Fourteenth Amendment. (Douglas v. Jeannette (1943) 319 U.S. 157, 162.) It is well settled that municipal ordinances are within the prohibition of the amendment. (Lovell v. Griffin (1938) 303 U.S. 444, 450.)

There is no doubt that Premier, as a disseminator of motion pictures, news, and other information and entertainment programming, engages in conduct protected by the First Amendment guaranties of freedom of speech and press. In Weaver v. Jordan (1966) 64 Cal.2d 235, cert. den., 385 U.S. 844, our Supreme Court invalidated an initiative measure banning the business of home subscription television in California as an abridgement of free speech guaranties. The court there observed that "(c)ommunication

by motion picture, by radio and by television falls within the constitutional protection" and that "amusement and entertainment as well as the exposition of ideas" are encompassed within such protection. (Id., at p. 242.) These principles are firmly embedded in the decisions of the United States Supreme Court. (See, e.g., Schad v. Borough of Mount Ephraim (1981) 452 U.S. 61, 65 ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. (Citations.)"); Joseph Burstyn, Inc. v. Wilson (1952) 343 U.S. 495, 501-502 (motion pictures, like books, magazones, and newspapers, are included within free speech and free press guaranties even though sold for a profit); Winters v. New York (1948) 333 U.S. 507, 510 ("The line between the informing and the entertaining

is too elusive for the protection of that basic right (of free speech). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.").)

In its most recent pronouncement dealing with economic regulation of the press, our highest court reemphasized that "A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." (Minneapolis Star v. Minnesota Comm. of Rev. (1983) __U.S.___, ___(75 L.Ed.2d 295, 303; 103 S.Ct. 1365), citing United States v. Lee (1982) 455 U.S. 252.) While acknowledging decisions upholding economic regulations generally applicable to all businesses, the court concluded that "(d)ifferential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State

asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." (75 L.Ed.2d at p. 305.)

The challenged tax in Minneapolis Star was a "use tax" imposed upon paper and ink products consumed in the production of a publication. Such paper and ink became the only items subject to the state's use tax which were components of goods to be sold at retail. The court found that this treatment of publishers differed from that of other enterprises in at least two ways: the use tax did not protect the sales tax (which exempted periodic publications, resulting in no "complementary function" to serve), and was levied on intermediate transactions rather than ultimate retail sales. (75 L.Ed. 2d at p. 302.) The Supreme Court concluded that this special use tax, unparalleled under Minnesota's tax scheme, singled out the press for special treatment. In examin-

ing whether such differential treatment was constitutionally permissible, the court stated: "The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press." (75 L.Ed.2d at p. 305, fn. omitted.)

Responding to Minnesota's contention that the use tax was merely a less onerous, substitute tax which could be generally and permissibly applied to the press, the court held that the state had offered no adequate justification for the differential tax, which was impermissible even if it did not

currently impose a greater effective burden since "the very selection of the press for special treatment threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially more burdensome treatment." (75 L.Ed. 2d at p. 307, original emphases.) The court reasoned that the state's interest in requiring the press to bear its share of the tax burden could be achieved by taxing the press equally with others thus avoiding differential tax treatment in accomplishing its revenue generating objectives. (75 L.Ed.2d at pp. 307-308.) Accordingly, such differential tax violated First Amendment guaranties.3/

Under the teachings of Minneapolis Star, we find that the City's business license tax on television subscription service businesses

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3/ The Minneapolis Star court found further constitutional infirmity in that the use tax, which exempted the first $100,000.00 of

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fails to pass constitutional muster as applied to Premier. The record before the trial court and us, consisting of the pleadings and pertinent portions of the City's municipal code, unmistakably establishes that the challenged tax is differentially burdensome to television subscription service businesses, thus triggering an inquiry whether that burden is impermissible under the First Amendment.

Under the relevant provisions of the City's code, judicially noticed below, (see Evid. Code, §§ 452; Stencel Aero Engineering Corp. v. Superior Court (1976) 56 Cal.App.3d

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(Fn 3 cont'd.)

paper and ink used in any calendar year, unfairly targeted a handful of publishers whose use of such products exceeded the exempt amount. (75 L.Ed.2d at pp. 308-309.) Noting that no similar exemption existed for other small enterprises, the court held that "to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." (75 L.Ed. 2d at p. 309.)

978, 986-987), an annual business license tax is imposed upon eighty-seven types of businesses under a variety of methods. These methods include flat fees, "per unit" fees, flat fees plus sums based upon the number of employees, and fees tied to gross receipts.[4/] Only four businesses pay fees tied to gross receipts. Outdoor advertisers pay a maximum of $900.00 plus $150.00 for each $30,000.00 gross receipts or fraction thereof in excess of $75,000.00. (Alameda Municipal Code, §13-195.) Drive-in theaters pay $45.00 for $20,000.00 or less of gross receipts, plus $2.25 for each $1,000.00

4/ Eight types of businesses pay a flat fee, the maximum being $600.00 per year. (Alameda Municipal Code, §§ 13-199, 13-1910, 13-1913, 13-1919 to 13-1921, 13-1928, 13-1932.) Twenty-three types pay "per unit" fees (e.g., a certain amount per a certain number of employees, rooms, seats or mechanical devices). (Id., §§13-191 to 13-193, 13-196 to 13-198, 13-1911, 13-1912, 13-1914, 13-1916, 13-1922, 13-1923, 13-1925, 13-1927, 13-1929, 13-1931, 13-1934, 13-1935, 13-1939, 13-1941 to 13-1943, 13-1950.) Illustrative of such fees are those based

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gross receipts or fraction thereof in excess of $20,000.00. (Id., § 13-1938.) Only the remaining two, television subscription service businesses and businesses providing emergency communications systems or alarms, are subject to Ordinance No. 1991. Those businesses are required to pay 3 percent of their gross receipts from Alameda subscription sales or fees. (Id., §§ 13-1951, 13-1952.)

(Fn 4 cont'd.)

upon $45.00 for the first person employed; $9.00 for each of the next nine employees; and $4.50 for each additional employee. Three types pay the greater of $75.00 or the amount derived from the $45.00/$9.00/ $4.50 per employee formula. (Id., §§ 13-1915, 13-1917, 13-1930.)

Forty-nine types of businesses pay a flat fee plus sums based upon the number of employees. (Id., §§ 13-194, 13-1924, 13-1933.) Forty-seven of these are professional or semi-professional businesses. They pay a fee of $45.00, $75.00, or $105.00, plus $15.00 per employee. Four additional types of businesses, including television subscription service businesses, pay a fee tied to gross receipts.

Additionally, most businesses are permitted to pay "in lieu" license fees based upon gross receipts rather than the other fees set forth in the code. The "in lieu" tax schedule ranges from $0.30 per $1,000.00 to $2.25 per $1,000.00. (Id., § 13-1105.) Ten types of businesses are excluded from electing to pay "in lieu" fees: the four (including television subscription service businesses) whose license fees are tied to gross receipts and six others. (Id., § 13-1102.) Of those six, five pay fees subject to a ceiling, the highest being $600.00. The sixth category, persons leasing hotels or office buildings, pays $4.00 per room.

It is thus apparent that the two types of businesses subject to Ordinance No. 1991 are taxed differently from any other business in the City.[5/] Not only is Premier

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5/ Since the validity of Ordinance No.

(Cont'd on next pg.)

taxed differently from the great majority of businesses, it is also taxed in a differentially more burdensome manner. For example, assuming annual gross receipts of approximately $210,000.00, as indicated by Premier, its business license tax for one year would be $6,300.00. Unlike Premier, most businesses are permitted to pay under the "in lieu" tax schedule. The maximum tax on $210,000.00 under that schedule would be $472.50 ($2.25 per $1,000.00 or less than one thirteenth of a 3 percent rate). Moreover, the businesses subject to Ordinance No. 1991 also receive differentially burdensome treatment in comparison to the other businesses which are precluded from paying the

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(Fn 5 cont'd.)

1991 as applied to businesses providing emergency communications systems or alarms is not before us, we express no views with respect to such issue.

"in lieu" tax.[6/] Lastly, while it is difficult to meaningfully compare rates imposed upon persons leasing hotel or office space with the treatment accorded Premier, it would require a hotel or office building of exceptional capacity (over 1500 rooms) to generate the same level of tax revenue sought to be exacted from Premier.

Under the principles set forth in Minneapolis Star, the tax burden imposed upon Premier, a disseminator of protected speech, cannot stand unless that burden is necessary to achieve an overriding governmental interest. The only interest asserted to justify the differential tax burden is the generation of revenue. (See Section 3 of

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6/ An outdoor advertiser with gross receipts of $210,000.00 would pay a license fee of $1,650.00 (a rate of less than 0.8%, approximately one-fourth of the rate imposed under Ordinance No. 1991); a drive-in theater with such revenue would pay $472.50, substantially less than the advertiser. As earlier noted, five others pay set fees not exceeding $600.00.

Ordinance No. 1991, ante, fn. 1.) While that purpose is an interest critical to any government, it cannot, standing alone, justify special treatment of a segment of the media which disseminates protected speech when alternative means of achieving the same interest without implicating First Amendment concerns are available. (Minneapolis Star v. Minnesota Comm. of Rev., supra, 75 L.Ed.2d 295, 305.)

In an attempt to justify such differential treatment, City argues that a legitimate distinction can be drawn between businesses which may elect to be taxed under the optional "in lieu" schedule and those -- such as Premier -- which may not. It contends that the former pay taxes and provide employment in the City of Alameda, while the latter do not. We remain unconvinced. Many of the business activities precluded from "in lieu" tax schedule treatment (e.g., outdoor advertisers, amusement parks and

exhibitions, drive-in theaters, dance halls, handbill distributors and rental services) undoubtedly pay city property taxes and employ local residents.

The City has shown no adequate justification for the special treatment of television subscription service businesses. In Minneapolis Star, the Supreme Court observed that the State of Minnesota could have achieved its goal of raising revenue by simply taxing businesses generally (75 L.Ed.2d at p. 305; cf. United States v. Lee, supra, 455 U.S. 252 (generally applicable tax enforceable notwithstanding religious objections)). Here, although the City could have likewise achieved a similar objective by imposing a generally applicable tax on businesses,[7/] it chose not to do so.

7/ City's reliance on City of Corona v. Corona Etc. Independent (1953) 115 Cal.App. 2d 382, cert. den., 346 U.S. 833, which upheld a business license tax on a newspaper,

(Cont'd on next pg.)

Since the tax imposed by Ordinance No. 1991 places a differential burden upon television subscription service businesses unjustified by any compelling interest of the City, that ordinance, as applied to Premier, violates the First Amendment to the United States Constitution.[8/] In view of our determination, it is unnecessary to reach Premier's argument based upon state constitutional grounds.

(Fn. 7 cont'd.)

is misplaced. The City of Corona's tax was nondiscriminatory and applied to all businesses conducted in the city. And to the extent that the City suggests that a tax cannot be struck down unless the enacting legislative body intended to censor speech, that contention has been squarely rejected in Minneapolis Star. (75 L.Ed.2d 295, 309.)

8/ While the rationale of our opinion would apply to any television subscription service business engaged in dissemination of speech protected by the First Amendment, the case before us involves only the specific business activities of Premier. Thus, we need not speculate as to whether every "television subscription service business" engages in similar protected activities.

We modify the judgment to declare that Ordinance No. 1991 is unconstitutional as applied to Premier and to enjoin its enforcement with respect to Premier only. As so modified, the judgment is affirmed.[9/]

CERTIFIED FOR PUBLICATION

9/ Much of the City's brief is directed to the question of whether Ordinance No. 1991 applies to cable television businesses. While it is true that the trial court concluded that Ordinance No. 1991 violated the First Amendment due to differential treatment between television subscription service businesses which do not have a cable television franchise and those which do have such a franchise, we find it unnecessary to address those issues, having concluded for other reasons that the ordinance is unconstitutional as applied to Premier. It is the action of the lower court, not the reasons for its action, which we review. If right upon any theory of the law applicable to the case, a judgment will be sustained regardless of the considerations which may have moved the trial court to its conclusion. (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19.)

Additionally, we note that the propriety of franchise fees which the City requires of cable television businesses is in no way involved in this case.

Racanelli, P.J.

WE CONCUR:

Elkington, J.

Newsom, J.

City of Alameda v. Premier Communications
A023536

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION ONE

City of Alameda,	)	
	)	
Plaintiff and Appellant.	)	Alameda
	)	
vs.	)	Superior Court
	)	
Premier Communications Network, Inc.,	)	No. 536851-8
	)	
Defendant and Respondent.	)	
	)	

BY THE COURT:

The Petition for Rehearing is denied.

Dated JUN 21 1984

RACANELLI, P.J. P.J.

CLERK'S OFFICE, SUPREME COURT

4250 STATE BUILDING

San Francisco, California 94102

AUG 15 1984

I have this day filed Order _____

HEARING DENIED

In re: 1 Civ. No. A023536

CITY OF ALAMEDA

vs.

PREMIER COMMUNICATIONS NETWORK, INC.

Respectfully,

Clerk

APPENDIX B

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Megan Tootell
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Telephone: (415) 261-4100

IN THE SUPERIOR COURT, STATE OF CALIFORNIA

COUNTY OF ALAMEDA

City of Alameda, a municipal corporation, Plaintiff, vs. Premier Communications Network, Inc., a California corporation, et al. Defendants.	NO. 536851-8 FIRST AMENDED CROSS-COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF
Premier Communications Network, Inc., a California corporation, Cross-Complainant, vs. City of Alameda, a municipal corporation, and DOES I through V. Cross-Defendants	

Cross-complainant Premier Communications Network, Inc. (hereinafter "Premier" complains of cross-defendant City of Alameda (hereinafter "City") as follows:

.....

WHEREFORE, Premier prays for injunctive relief as set forth below.

SECOND CAUSE OF ACTION

(First Amendment - Injunctive Relief)

14. Premier incorporates herein as though fully set forth each and every allegation contained in paragraphs 1 through 12 of the First Cause of Action.

15. Like live theatre, movie theatres and other entertainment and news sources, Premier has the status of a First Amendment disseminator. By virtue of its protected status, Premier is entitled to the full measure of First Amendment protections and guarantees.

16. As aforesaid, the tax now assessed against Premier for the privilege of doing business is some thirteen (13) times greater than the tax imposed on any other business. This tax singles out a First Amendment speaker and imposes on it a financial burden which no other entity must bear, as a condition to the exercise of its First Amendment rights.

17. This tax burdens the fundamental

constitutional rights of free speech. The mere application of a significantly greater tax to a First Amendment speaker violates the constitutional protections of the First Amendment. Moreover, the City has offered no justification for the undue burden imposed on Premier which operates to inhibit Premier's exercise of First Amendment rights.

APPENDIX C

FARROW, SCHILDHAUSE, WILSON & RAINS
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

CITY OF ALAMEDA, a municipal corporation, Plaintiff, vs. PREMIER COMMUNICATIONS NETWORK, INC., a California corporation, etal. Defendants. AND RELATED CROSS-ACTION.	NO. 536851-8 ORDER RE JUDGMENT AND INJUNCTION

This cause came on for trail on April 21, 1983. The action was brought by the City of Alameda ("City") to enforce its Ordinance No 1991 against defendant Premier Communications Network, Inc. ("Premier"). Premier distributes pay television service to home subscribers by what is known as MDS (over-the-air microwave) technology. Ordi-

nance No. 1991 imposes a "business license fee" on some, but not all, companies which provide "Television Subscription Service" to City residents.

At the beginning of trial, both parties moved the Court for Judgment on the Pleadings, and arguments were heard and certain pleadings and ordinances accepted as exhibits. The Court, having been fully advised, hereby grants defendant Premier's Motion for Judgment on the Pleadings.

On its face, and when read together with other City ordinances which are in the record dealing with "franchised" television subscription service, the Court finds that Ordinance No. 1991 subjects defendant Premier to differential tax treatment. Nor can this differential treatment be corrected by a credit mechanism applied against the franchise fees which some subscriber television services pay to the City. Ordinance No. 1991 is thus an unconstitutional infringement of

the First Amendment of the United States Constitution and Article I, Section 2 of the Constitution of the State of California, and the court so holds.

In light of the holding above, it is hereby ORDERED:

1. That the motion of defendant Premier Communications Network, Inc. for Judgment on the Pleadings is hereby granted;

2. That Final Judgment be entered in favor of defendant Premier Communications Network, Inc., declaring Ordinance No. 1991 unconstitutional, invalid, and unenforceable; and

3. That a permanent injunction be entered enjoining enforcement of Ordinance No. 1991.

Dated: June 6, 1983

/s/
HONORABLE JACQUELINE TABER
Superior Court of Alameda

Entered in Judgment Book
Book (Reel) 714 Pg 28
June 6, 1983

APPENDIX D

TITLE XIII. LICENSES AND PERMITS

Chapter 1. Licenses, 13-111.

Chapter 2. Permits, 13-211.

Chapter 3. Charitable Solicitation Permits, 13-311.

CHAPTER 1. LICENSES

Article 1. Definitions, 13-111.

Article 2. Bureau of Licenses, 13-121.

Article 3. License Required, 13-131.

Article 4. Application, Form and Issuance, 13-141.

Article 5. Exemptions, 13-151.

Article 6. Appeals, 13-161.

Article 7. Vehicle Plates, 13-171.

Article 8. Enforcement--Penalties--Refunds, 13-181.

Article 9. License Fees, 13-191.

Article 1. Definitions

§13-111. DEFINITIONS. For the purpose of this chapter certain words and phrases are defined and certain provisions shall be

construed as herein set out, unless it shall be apparent from their context that a different meaning is intended.

§13-111 (a). AUCTIONEER. The term "auctioneer" shall be defined as a person who sells or offers for sale any real or personal property at auction (exclusive of sales under deeds of trust, mortgages, pledges or sales under order of court or judicial proceedings), or who carries on the business of auctioneer, whether or not at a fixed place of business in said City.

§13-111 (b). BUSINESS. The term "business" shall be held and construed to mean and include professions, trades, occupations and all and every kind of calling or enterprise carries on for profit or livelihood.

§13-111 (c). CONDUCT--CONDUCTING. The terms "conduct" or "conducting" shall be defined as and include the act of conducting, managing, engaging in or carrying on a certain business or occupation.

§13-111(f). DANCE OR DANCE HALL, PUBLIC. The term "public dance" or "public dance hall" shall mean any dance or place where the business of holding or conducting public dances or dancing is carried on and to which the public is admitted.

§13-111 (g). EMPLOYEE. The terms "employee" or "person employed" shall be construed to mean and include all persons engaged in the operation or conduct of any business, whether as owner, any member of the owner's family, partner, agent, manager, solicitor and any and all other persons employed or working in said business.

§13-111 (h). EMPLOYEES, AVERAGE NUMBER OF. The term "average number of persons employed" shall be defined to mean the average number of persons employed daily in the applicant's business for the period of one year, and shall be determined by ascertaining the total number of hours of service performed by all employees during the

previous year, and dividing the total number of hours of service thus obtained by the number of hours of service constituting a day's work, according to the custom or laws governing such employments, and by again dividing the sum thus obtained by the number of business days in each year. In computing the "average number of persons employed," fractions of numbers shall be excluded.

§13-111 (j). FIXED PLACE OF BUSINESS. A "fixed place of business" is defined as a place of business regularly kept open, with someone in charge thereof for the transaction of the particular business engaged in during the hours customary to transact such business.

§13-111 (n). PEDDLING. For the purpose of this chapter the word "peddling" shall mean and include engaging in or conducting the business of going from house to house, place to place, or in or along the streets, within the City of Alameda, selling and making immediate delivery or offering for

sale and immediate delivery, any goods, wares, merchandise or anything of value in the possession of the peddler, to persons other than manufacturers, wholesalers,jobbers or retailers in such commodities.

§13-111 (o). SOLICITOR. For the purpose of this chapter, the word "solicitor" shall mean and include any person who engages in the business of going from house to house, place to place, or in or along the streets, within the City of Alameda, selling or taking orders for, or offering to sell or take orders for, goods, wares, merchandise or other things of value for future delivery, or for service to be performed in the future.

§13-111 (r) PERSON. For the purpose of this chapter the word "person" shall be defined as every individual, partnership, joint-venture, corporation or other legal entity conducting or carrying on a business, profession, or other enterprise, or a portion thereof, within the corporate limits of the

City of Alameda. (As added by Ordinance No. 1186 N.S., passed June 19, 1956.) (Article 1 added by Ordinance No. 834 N.S., passed July 20, 1943.)

§13-111 (s). TELEVISION SUBSCRIPTION SERVICE. "Television Subscription service" shall mean a business that sells rights to or subscriptions for the receipt of television signals not available by use of standard antennae. Television subscription service includes, but is not limited to, community antenna television systems or other antenna systems required to receive satellite signals or any signal which requires the use of a specific antenna or decoding or unscrambling device whether delivered to the consumer by means of cable or otherwise. (As amended by Ordinance No. 2140 N.S., effective August 5, 1983.)

Article 2. Bureau of Licenses

§13-121. LICENSE COLLECTOR. The Treasurer of the City of Alameda shall be ex-

officio License Collector. (As added by Ordinance No. 834 N.S., passed July 20, 1943.)

§13-122. BUREAU OF LICENSES. The Bureau of Licenses is hereby created, which shall be composed of the License Collector, City Manager and Mayor of the City. (As added by Ordinance No. 834 N.S., passed July 20, 1943.)

§13-123. DUTIES AND POWERS.

(a) BUREAU. It shall be the duty of the Bureau of Licenses and it shall have the power to administer this chapter in accordance with the terms hereof.

(b) COLLECTOR. It shall be the duty of the License Collector and he shall have the power to regularly and promptly require the licensing of all businesses to which this chapter applies and to cause the collection of the fees therefor and the prosecution of all persons violating any of the provisions of this chapter.

Article 3. License Required

§13-131. LICENSE REQUIRED. It shall be unlawful for any person, either for himself or for any other person, to commence, conduct, carry on or engage in any business in this chapter specified, in the City of Alameda, without first having procured a license from said City so to do, or without complying with any and all regulations of such business contained in this chapter; and the carrying on of any business without first having procured a license from said City so to do, or without complying with any and all regulations of this chapter, shall constitute a separate violation of this code for each and every day that such business is so carried on or conducted.

§13-132. SEPARATE LICENSE FOR EACH PLACE OF BUSINESS. A separate license must be obtained for each and every branch establishment or separate place of business in which a business is conducted, except a

branch establishment operated by a person licensed under Section 13-194 of this code, in which case a duplicate license for each branch establishment shall be issued for a fee of $3.00 for each such place; provided, that warehouses and storage plants used in connection with and incidental to a business licensed under the provisions of this chapter shall be deemed to be separate places of business or branch establishments. (As amended by Ordinance No. 1800 N.S., effective 5/7/76.)

§13-133. LICENSE FEE A TAX; DOES NOT PERMIT BUSINESS OTHERWISE PROHIBITED. The term "license" as used in this Chapter shall not be construed to mean a permit. The fees prescribed by this Chapter constitute a tax for municipal revenue purposes only, and are not regulatory permit fees.

The payment of a license fee required by the provisions of this Chapter, and its acceptance by the City, and the issuance of

a license to any person shall not entitle the person so paying such tax, nor the holder of such license, to carry on any business unless he has complied with all of the requirements of this Code and all other applicable laws, nor to carry on any business in or on any building or premises designated in such license in the event such building or premises are situated in a locality or zone in which the conduct of such business is in violation of any law, nor to carry on any business or activity for which a permit is required as a prerequisite to the conduct of such business or activity, nor to carry on any business or activity which is unlawful. (As amended by Ordinance No. 1613 N.S., effective March 19, 1970.)

§13-134. WHEN PERMIT PREREQUISITE TO LICENSE. No license shall be issued hereunder when the provisions of this code or of some other ordinance of the City of Alameda require a permit to be obtained as a pre-

requisite to engage in or conduct such business, until such permit is first applied for and obtained. Any license issued in violation of the provisions of this section shall be void.

§13-135. LICENSE FEE, WHEN AND HOW PAYABLE.

(a) All license fees shall be paid in advance, in lawful money of the United States, at the office of the License Collector.

(b) Except as herein otherwise provided, all licenses required hereunder shall be for terms and shall be due and payable as follows:

(1) The term of annual licenses shall be one (1) year beginning July 1st of each year;

(2) The term of semi-annual licenses shall be for six (6) months beginning, respectively, July 1st and January 1st of each year;

(3) The term of quarterly licenses shall be for three (3) months beginning, respectively, on July 1st, October 1st, January 1st and April 1st of each year.

All license fees shall be due and payable on the first day of the license term for which the license is required. Daily licenses shall be due and payable each day in advance. All such licenses shall be valid only for the period issued.

Article 8. Enforcement--Penalties--Refunds

§13-181. PENALTY FOR NON-PAYMENT OF ANNUAL OR SEMI-ANNUAL LICENSE. Every annual or semi-annual license which is not paid within a period of thirty (30) days from the time the same becomes due and payable is hereby declared to be delinquent and the Bureau of Licenses shall thereupon add to said license and collect a penalty of ten per cent (10%) of the license so delinquent;

if such license is not paid within sixty (60) days from the time such license becomes due and payable, an additional sum of fifteen per cent (15%) of said license shall be added to said license and collected as a penalty.

§13-184. LICENSE A DEBT. The amount of any license fee and penalty imposed by the provisions of this chapter shall be deemed a debt to the City of Alameda and any person carrying on any business without first having procured a license from said City so to do shall be liable to an action in the name of said City in any court of competent jurisdiction, for the amount of license and penalties imposed on such business.

Article 9. License Fees

§13-191. MANUFACTURING. Every person conducting, managing or carrying on the business of shipbuilding, ship repairing, dry docking, steel fabrication, foundry, forging or the business of manufacturing, processing, fabrication, compounding, or preparing for

sale any article, commodity, product, substance or other thing not otherwise specifically licensed by this article or any other provisions of this code or any ordinance of the City of Alameda, shall pay an annual license fee based upon the average number of persons employed in such business according to the following schedule:

For the first person employed.....	$ 45.00
For the next nine (9) persons employed, per person.....	9.00
For each additional person employed.....	4.50

§13-192. WHOLESALING, JOBBING, ETC.

Every person conducting, managing or carrying on any wholesale, jobbing, ship terminal or wharfinger business, or conducting, managing or carrying on the business of selling goods, wares, merchandise or other thing of value at wholesale, and not otherwise specifically licensed by this Chapter or any other provisions of this article or any

ordinance of the City, shall pay an annual license fee based upon the average number of persons employed in such business according to the following schedule:

For the first person employed.....$ 45.00

For the next nine (9) persons employed, per person..... 9.00

For each additional person employed..... 4.50

§13-193. RETAILING AND OTHER BUSINESSES NOT SPECIFICALLY LICENSED. Every person conducting, managing or carrying on any retail business, or conducting, managing or carrying on the business of selling goods, wares, merchandise or any article or thing of value at retail, and not otherwise specifically licensed by this Chapter or any other provisions of this code or any ordinance of the City, and every person conducting, managing or carrying on any business that is not specifically licensed by this article or any other provisions of this code

or any ordinance of the City of Alameda, shall pay an annual license fee based upon the average number of persons employed in such business according to the following schedule:

For the first person employed.....	$ 45.00
For the next nine (9) persons employed, per person.....	9.00
For each additional person employed.....	4.50

§13-194. PROFESSIONAL, SEMI-PROFESSIONAL--CONNECTED BUSINESS. Every person or individual conducting, managing, carrying on, or being occupied in any business or profession hereinafter designated in this section, shall pay an annual license fee in the amount so set out in this section; provided, further, that each licensee under this section shall pay an additional amount of $15.00 for each and every person employed by said licensee on a salary or commission basis. It is the intent of this section that each and every

person or individual engaged in the listed businesses or professions, whether such person be a principal, partner, associate, or joint-venturer, shall pay the annual license fee set out.

The businesses and professions referred to above in this section are the following:

Accountant	$ 45.00
Artist	45.00
Auditor	45.00
Advertising Counsel	45.00
Appraiser	45.00
Architect	45.00
Assayer	45.00
Attorney: Attorney at Law	75.00
Patent Attorney	75.00
Bacteriologist	45.00
Certified Public Accountant	75.00
Chemist	45.00
Chiropodist	75.00
Chiropractor	75.00

Collection Agency or Mercantile Agency	$ 45.00
Dentist	105.00
Designer or Decorator	45.00
Draftsman	45.00
Drugless Practitioner (provided, however, that this section shall not apply to persons who treat the sick through prayer or spiritual means)	75.00
Electrologist	45.00
Employment Agency	45.00
Engineer: Civil Engineer	45.00
Chemical Engineer	45.00
Consulting Engineer	45.00
Hydraulic Engineer	45.00
Mechanical Engineer	45.00
Mining Engineer	45.00
Electrical Engineer	45.00
Engraver	45.00
Geologist	45.00
Illustrator, or Show Card Writer	45.00

Insurance Adjuster or Claims Adjuster	$ 45.00
Insurance Broker or Agents	75.00
Landscape Gardener or Landscape Architect	45.00
Lapidary	45.00
Lithographer	45.00
Marriage or Family Counselor	45.00
Money Lender or Money Broker, or person engaged in buying or selling obligations	45.00
Mortician	45.00
Nursing Homes	45.00
Oculist	105.00
Optometrist	75.00
Osteopath	105.00
Physician	105.00
Physio-therapist	75.00
Psychiatrist	105.00
Psychologist	75.00
Real Estate Broker or Agents	75.00
Real Estate Salesman	75.00

Surgeon.....$ 105.00

Surveyor..... 45.00

Taxidermist..... 45.00

Tax Counselor..... 45.00

Veterinarian..... 75.00

§13-195. ADVERTISING, BILLBOARDS.

Every person conducting or carrying on the business of outdoor advertising in the City by means of bill posting, bulletin, sign painting, pasting, sticking, tacking, hanging, affixing or painting bills or signs to or upon posts, fences, walls, billboards, buildings or other structures shall pay an annual license fee based upon the annual gross receipts of such business according to the following schedules:

Less than $15,000 gross receipts the sum of.....$ 300.00

$15,000 or more and less than $30,000 gross receipts the sum of..... 450.00

$30,000 or more and less than $45,000 gross receipts the sum of.....$ 600.00

$45,000 or more and less than $60,000 gross receipts the sum of..... 750.00

$60,000 or more and less than $75,000 gross receipts the sum of..... 900.00

For gross receipts of $75,000 or over, the sum of $900.00 plus $150.00 for each $30,000 gross receipts or fraction thereof in excess of $75,000 gross receipts.

(As amended by Ordinance No. 2061 N.S., effective August 21, 1981.)

§13-196. ADVERTISING VEHICLES. Every person conducting the business of advertising by means of any vehicle containing amplifiers, phonographs, loud speakers, microphones, broadcasting radio or devices for public addresses and/or carries advertising signs or

search-lights, and which is used for announcing or advertising upon the streets or public grounds in the City of Alameda, shall pay an annual license tax of $75.00 per vehicle for a term ending twelve (12) months from the date of issuance of such license.

§13-197. AMUSEMENT PARKS. Every person conducting an amusement park containing any of the amusement devices or equipment hereinafter referred to, not in conjunction with a transient carnival, fair or other open-air amusement referred to in Section 13-1914 of this code, and when the property and equipment used in connection with the operation of such amusement park is assessed on the current tax rolls of the City, shall pay a license fee graduated in accordance with the number and variety of amusement or recreation devices, in accordance with the following schedule:

(a) For every merry-go-round, ferris-wheel, scenic railway, chute-the-

chutes, dodgem, swing or other similar amusement equipment or device, $75.00 per year;

(b) For each bathing or swimming establishment, $75.00 per year;

(c) For each ball and ring throwing game, spin-the-wheel, mechanical or electrical game, shooting gallery, or other similar game, device or equipment, $60.00 per year;

(d) For each separate booth used for the sale of food, beverages or merchandise not in eonnection with any game, $30.00 per year.

Provided, that the aggregate amount of annual license fee payable by any single amusement park containing or operating a combination of two or more of the various amusement devices and booths herein in this section enumerated, shall not exceed the sum of $600.00.

§13-198. AUCTIONEER. Every person conducting the business of an auctioneer shall pay a license fee of $75.00 per day in advance.

§13-199. AUTOMOBILE WRECKING ESTABLISHMENTS. Every person conducting the business of an "automobile wrecking establishment," as defined in Section 12-741 of this code, shall pay an annual license fee of $150.00.

§13-1910. BANKRUPT SALES. Every person conducting a fire, bankrupt or wreck sale shall pay an annual license fee of $100.00 for a term ending twelve (12) months from the date of issuance of such license.

§13-1911. BILLIARD OR POOL ROOM. Every person conducting any public billiard or pool room shall pay an annual license of $18.00 for each billiard or pool table, or a license fee computed under Section 13-193, whichever is the greater.

§13-1912. BOWLING ALLEY, ETC. Every person conducting, managing or carrying on a public bowling, skee ball or bat ball alley, or other similar device or equipment shall pay an annual license fee of $18.00 for each such alley, device or equipment, or a license fee computed under Section 13-193, whichever is the greater.

§13-1913. BOXING AND WRESTLING EXHIBITIONS. Every person engaged in the business of conducting a boxing or wrestling exhibition or contest shall pay a quarterly license fee of $150.00, for a term ending three (3) months from the date of issuance of such license.

§13-1914. CIRCUS, CARNIVALS, FAIRS, ETC. Every person conducting, managing, or carrying on any transient circus, fair, carnival, open air amusement device, or other like or similar exhibition or amusement in the City of Alameda shall pay, in advance, a license fee in the amount of $250.00 per day for each

and every day of operation of such exhibition.

No portion of any street shall be used for the purpose of conducting any circus, fair, carnival or other exhibition of amusement referred to in this section.

Every person conducting, managing or carrying on any procession or parade in connection with any of the above shows or exhibitions, and not having a license for any such show or exhibition within the City of Alameda, shall pay $100.00 for each such procession or parade.

§13-1915. ELECTRICIANS. Every person conducting the business of installing, altering, repairing or maintaining electrical equipment of Class 1, as defined in Section 10-211(e) of this code, shall pay an annual license fee of $75.00 or a license fee computed under Section 13-193, whichever is the greater.

§13-1916. FLEA MARKETS. Every person conducting the business of a penny market, flea market, swap market, where sellers rent spaces to display their wares, or rent stalls, or other designated places for the purpose of selling or trading new and or used merchandise, shall pay an annual license fee based upon the number of stalls or spaces made available by the owners or operators of such markets, according to the following schedule:

For the first stall.....	$ 45.00
For each of the next nine (9) stalls, per stall.....	9.00
For each additional stall provided.	4.50

§13-1917. GAS APPLIANCES. Every person conducting the business of installing or repairing any "gas appliances," as defined in Section 10-713 of this code, shall pay an annual license fee of $75.00 or a license fee computed under Section 13-193, whichever is greater.

§13-1918. CREDIT FOR SECTION 13-1915, 13-1917 OR 13-1930. Persons who have paid the fee required under either Section 13-1915, 13-1917 or 13-1930 shall not be required to pay the fee for an additional license under Section 13-1915, 13-1917 or 13-1930.

§13-1919. HANDBILLS. Every person conducting, managing or carrying on the business of distributing handbills, dodgers, or samples, or other printed commercial advertisements, or commercial advertising matter of any kind, shall pay an annual license fee of $120.00.

§13-1920. HERBS--RETAILING, WHOLESALING, ETC., AND PRESCRIBING.

(a) Every person conducting, managing or carrying on the business of retailing, wholesaling, jobbing or otherwise dealing in herbs (except drug stores) shall pay an annual license fee of $75.00 for a term ending twelve (12) months from the date of issuance of

each license.

(b) Every person conducting, managing or carrying on the business of prescribing herbs (except physicians and surgeons) shall pay an annual license fee of $225.00 for a term ending twelve (12) months from the date of issuance of such license; provided, however, that any person paying a license under the provisions of this subdivision shall be entitled to retail, wholesale, job or otherwise deal in herbs without the payment of an additional license.

§13-1921. HOME OCCUPATIONS. Every person conducting the business of cosmetology, dressmaking, fancy-work, millinery, needlework, washing or ironing of laundry, teaching of dancing or painting or of vocal or instrumental music or maintaining an artist's studio, when such business or studio is conducted as a home occupation and the annual gross receipts thereof are

$1,000.00 or less, shall pay an annual license fee of $6.00. Such fee shall not be prorated if issued after the beginning of the license term.

For the purpose of this section the words "home occup tion" shall mean any such business which is conducted entirely within a dwelling by a resident thereof and which business is merely incidental to the residential use of such dwelling and no assistant is employed in connection with such business.

§13-1922. HOTEL, OFFICE BUILDING, ETC. Every person conducting, managing or carrying on a hotel, office building, rooming house, or any dwelling unit for rent, lease or hire, shall pay an annual license fee of Four Dollars ($4.00) for each and every room contained in any such building; provided, however, not to exceed five (5) rooms, used for the living quarters of the owner or manager of such property shall be exempt from the provisions of this section; and,

provided further, that this section shall not apply to a single-family dwelling on an existing lot of record. (As amended by Ordinance No. 1923 N.S., effective June 30, 1978.)

§13-1923. JUNK COLLECTOR. Every person conducting or carrying on the business of a junk collector shall pay an annual license of $36.00 for each person employed in such business, such license to be issued for a term ending twelve (12) months from the date of issuance of said license.

§13-1924. JUNK DEALER. Every person conducting, managing or carrying on the business of a junk dealer shall pay an annual license of $150.00; and if the average number of persons employed exceeds three (3), then an additional sum of $15.00 for each such employee over three.

§13-1925. MECHANICAL AMUSEMENT DEVICES. Every person conducting the business of operator of a mechanical amusement device shall pay an annual license fee for each

separate mechanical amusement device according to the following schedule:

(a) For each mechanical amusement device operated solely to supply music and operated by coin or token, the sum of $30.00 per year;

(b) For any other mechanical amusement device operated by coin or token representing 1¢, the sum of $9.00 per year;

(c) For any other mechanical amusement device operated by coin or token representing more than 1¢, the sum of $60.00 per year.

For the purpose of this section the following words shall have the following respective meanings:

"Mechanical amusement device" shall mean any machine or device which, upon the insertion of a coin, plug or token in any slot or receptacle attached to said machine or connected therewith, operates or which may be operated for use as a game, contest, amuse-

ment or to supply music or which may be used for any such game, contest, amusement or to supply music and which does not contain a pay-off device for the return of slugs, money, coins, checks, tokens or merchandise;

"Operator" shall mean any owner of such mechanical amusement device who operates or permits the same to be placed or operated in his place of business or in any place under his control and who installs or maintains the same in any place where the same can be played or operated by persons in or about said place or any person in whose place of business any such mechanical amusement device is placed for the use, amusement, patronage or recreation of the public or of persons in or about said place.

Every such mechanical amusement device shall have stamped upon the same a serial number to identify such device and any license issued pursuant hereto shall be issued for a particular mechanical amusement

device. Such license shall be affixed upon the mechanical amustment device for which the same was issued in a conspicuous place and shall remain upon said device until a new and different license is issued for such device. No such license shall be transferable to any person or from one mechanical amusement device to another.

§13-1927. NEWS STANDS. Every person maintaining upon the streets or sidewalks of the City of Alameda any news stand, hand cart or other vehicle for the sale or offering for sale of newspapers, shall pay an annual license fee of $30.00.

§13-1928. PAWNBROKER. Every person conducting the business of a pawnbroker shall pay an annual license fee of $300.00 for a term ending twelve (12) months from the date of issuance of such license.

§13-1929. PEDDLER, SOLICITOR. Every person conducting the business of peddling any goods, wares, merchandise or other thing

of value, or soliciting for the sale or taking orders for, or offering to sell or take orders for such goods, wares, merchandise or other thing of value for present or future delivery, or for service to be performed immediately, or in the future, and not otherwise specifically licensed by this code or any ordinance of the City of Alameda, excepting newspapers, periodicals, and publications, shall pay a quarter license of $45.00 for each person employed in such business, for a term ending three (3) months from the date of issuance of such license.

The above notwithstanding, any student under the age of eighteen (18) who is in business for himself, provided that the gross income of said student does not exceed One Thousand Dollars ($1,000.00) per annum, shall pay an annual license fee of $2.00. Such fee shall not be prorated if issued after the beginning of the license term.

§13-1930. PLUMBING. Every person conducting the business of master plumber or installing, altering, repairing or maintaining plumbing, shall pay an annual license fee of $75.00 or a license fee computed under Section 13-193, whichever is greater.

For the purpose of this section the words "Master plumber" and "plumbing" shall have the meaning ascribed to such words, respectively, in the Alameda Plumbing Code.

§13-1931. PUBLIC DANCE. Every person conducting the business of a public dance hall or public dance shall pay a quarterly license based upon the number of days per week that dances are held, according to the following schedule:

Where dances are held once a week, per quarter	$ 15.00
Where dances are held twice a week, per quarter	22.50
Where dances are held three times a week, per quarter	30.00

Where dances are held four times a week, per quarter.....$ 37.50

Where dances are held five times a week, per quarter..... 45.00

Where dances are held six times a week, per quarter..... 52.50

Where dances are held seven times a week, per quarter..... 60.00

Where dances are held less than once a week, $6.00 for each day such dance is conducted.

Any person having a license under this section shall not be required to procure an additional license to conduct a dancing academy at the same location and under the same management as said public dance hall.

§13-1932. SCISSORS GRINDERS, ETC.

Every person conducting the business of grinding or sharpening scissors, knives, cutlery, lawn mowers, or mechanical tools, when the person conducting said business travels from place to place or from house to house shall

pay an annual license fee of $15.00.

§13-1933. SHOE SHINE STAND. Every person engaged in the business of operating or maintaining a shoe-shine stand or parlor shall pay a license fee of $18.00 per year plus $6.75 for each additional person engaged in such business.

§13-1934. STREET VENDOR. Every person conducting the business of street vendor shall pay a quarterly license fee of $105.00 for each person employed in such business, for a term ending three (3) months from the date of issuance of such license.

§13-1935. TAXICABS, ETC. Every person conducting any business regulated by Chapter 1, Title VII of this code, or any ordinance supplementary thereto, and hereinafter enumerated, shall pay an annual license fee as follows:

(a) Taxicab business, $20.00 per public motor vehicle;

(b) Motor Bus business, $40.00 per public motor vehicle;

(c) Automobiles for Hire business, $20.00 per public motor vehicle.

§13-1936. THEATERS, MOVING PICTURES, ETC.--DAILY SHOWING. Every person conducting the business of daily production of theatrical or vaudeville performances, or the exhibition of motion pictures, or lectures, or entertainments, or shows, or contests, or exhibitions, not otherwise specifically licensed by the provisions of this code or any ordinance of the City of Alameda, shall pay an annual license fee based upon the seating capacity of such theater, auditorium or other place, according to the following schedule:

For a seating capacity of less than 750 persons, per year.....$ 75.00

For a seating capacity of 750 persons and less than 1,000 persons, per year..... 90.00

For a seating capacity of 1,000 persons and less than 1,250 persons, per year.....$105.00

For a seating capacity of 1,250 persons and less than 1,500 persons, per year..... 120.00

For a seating capacity of 1,500 persons to 1,750 persons, inclusive, per year..... 135.00

The additional sum of $3.00 for each 100 or fraction thereof, of seating capacity in excess of 1,750 seating capacity.

§13-1937. THEATERS, MOVING PICTURES, ETC.--OTHER THAN DAILY SHOWING. Every person conducting, managing or carrying on the business of producing theatrical or vaudeville performances, or the exhibition of motion pictures, or lectures, or entertainments, or shows, or contests or exhibitions, not otherwise specifically licensed by the provisions of this code or any ordinance of the City of Alameda, shall pay a

daily license, or an annual license based upon the seating capacity of such theater, auditorium or other place, according to the following schedule:

For a seating capacity of less than 500 persons, $4.50 per day or $30.00 annually;

For a seating capacity of 500 persons and less than 750 persons, $6.00 per day or $45.00 annually;

For a seating capacity of 750 persons and less than 1,000 persons, $7.50 per day or $60.00 annually;

For a seating capacity of 1,000 persons to 1,500 persons, inclusive, $9.00 per day or $75.00 annually;

The additional sum of $3.00 per day or $7.50 annually for each 250 seating capacity, or fraction thereof, in excess of 1,500 seating capacity.

§13-1938. THEATRES--DRIVE-IN. Every person conducting, managing or carrying on the business of producing or showing theatri-

cal or vaudeville performances, musical or other entertainments, shows or exhibitions, or exhibiting motion pictures in or upon premises which are not enclosed with four walls and a roof, which business is not otherwise specifically licensed by the provisions of this Code, shall pay an annual license fee based upon the annual gross receipts of such business as follows:

$45.00 for $20,000.00 or less, of gross receipts; $2.25 for each additional $1,000.00 (or fractional part thereof) of gross receipts over $20,000.00.

If said business is operated on a temporary basis, the license fee shall be $22.50 per each day of operation, payable in advance of each day's operation.

§13-1939. TRANSPORTATION OF PERSONS AND GOODS.

(a) Every person engaged in the transportation of goods and/or persons and not otherwise specifically taxed

by other business license provisions of this article shall pay an annual license fee based upon the average number of persons employed by such business in the City of Alameda according to the following schedule:

For the first person employed	$ 45.00
For the next nine (9) persons employed, per person	9.00
For each additional person employed	4.50

(b) All persons paying a tax imposed by the Highway Carriers Uniform Business License Tax Act of the State of California shall not be required to pay the license fee imposed by this section with respect to those activities taxed by said Act.

§13-1940. EXCEPTIONS. No vehicle license or other license fee shall be required of any person conducting or engaging

in the business of transportation of property when the business conducted by such person in the City is limited solely and exclusively to transporting and delivering property to, or receiving and transporting property from, any freight depot, dock, wharf or ship terminal in the City as a part of the movement or shipment of such property by railroad, steamer, marine or other common carrier between points of origin and of destination both of which are situated outside of the City of Alameda.

§13-1941. VENDING MACHINES. Every person, conducting the business of selling goods, wares or merchandise by means of vending machines in and upon or over and along any public street, or alley, or other public place, or any place of business, shall pay an annual license fee based upon the average number of persons employed in such business according to the following schedule:

For the first person employed.....$ 45.00

For the next nine (9) persons

employed, per person..... 9.00

For each additional person employed 4.50

§13-1942. GENERAL CONTRACTOR, ROOFING CONTRACTOR, PAINTING CONTRACTOR, SEWER CONTRACTOR, PAVING CONTRACTOR. Every person conducting the business of a general contractor, engineering or building, roofing contractor, painting contractor, sewer contractor or paving contractor as described by the Business and Professions Code of the State of California and the rules and regulations promulgated thereunder shall pay an annual license fee based upon the average number of persons employed in such business according to the following schedule:

For the first person employed.....$ 45.00

For the next nine (9) persons

employed, per person..... 9.00

For each additional person employed 4.50

§13-1943. TELEPHONE COMPANIES, TELEGRAPH COMPANIES. Every person conducting, managing or carrying on a telephone or telegraph business within the City of Alameda, or any combination thereof, and not otherwise specifically licensed by this chapter or any other provisions of this article or ordinance of this City, shall pay an annual license fee based upon the average number of persons employed in such business according to the following schedule:

For the first person employed.....	$ 45.00
For the next nine (9) persons employed, per person.....	9.00
For each additional person employed	4.50

§13-1950. GENERAL. For the purpose of the operation and computation of license fees under this chapter, whenever any person, subject to the provisions of Section 13-191 to Section 13-1949, inclusive, is managing, carrying on, or conducting a business, profession, or other enterprise as a mercantile,

manufacturing or business corporation, as defined by Section 14, Article XIII, of the Constitution of the State of California, then such business license fee shall be the greater of (1) an amount computed under the specific section pertinent to such business, profession, or other enterprise; or, (2) an amount as an annual license fee computed as follows:

For the first person employed.....	$ 45.00
For the next nine (9) persons employed, per person.....	9.00
For each additional person employed	4.50

(Article 9 as amended by Ordinance No. 1800 N.S., effective May 7, 1976.)

§13-1951. TELEVISION SUBSCRIPTION SERVICE.

(a) Every person conducting a television subscription service business shall pay an annual license fee based upon three percent (3%) of the gross receipts of Alameda subscription

sales or fees for the previous year, as defined by Section 13-1104, except that the first year's fee shall be three percent (3%) of subscription fees payable thirty (30) days after the subscription is paid.

(b) In the event that state or federal law preempts the amount chargeable as a tax or franchise fee said annual license fee shall be the maximum allowed under state or federal law not in excess of subsection (a).

(c) No license issued under this Chapter for television subscription service where the City Council may lawfully require a franchise agreement between the television subscription service operator and the City shall be construed to satisfy any such franchising agreement. (As amended by Ordinance No. 2140 N.S., eff. 8/5/83.)

§13-1952. EMERGENCY COMMUNICATIONS SYSTEMS. Every person conducting the business of providing fire or police or other emergency communications systems or alarms shall pay the annual license fee set forth for television subscription service (§13-1951). Persons providing both television subscription service and services hereunder may combine their sales and pay the tax on all receipts under either this Section or §13-1951. (As added by Ordinance No. 1991 N.S. effective December 4, 1979.)

Article 10. In Lieu License Fees

§13-1101. IN LIEU FEES. Any person, not excluded hereunder, may elect to pay a license fee based on gross receipts under the provisions of this article in lieu of the fee required by other articles of this Chapter.

§13-1102. EXCLUDED. Persons required to pay license fees under Sections 13-195, 13-195.5, 13-197, 13-1913, 13-1919, 13-1920, 13-1922, 13-1931, 13-1938, 13-1951, and

13-1952 and persons with no previous years' gross receipts shall not pay in lieu fees under this article. (As amended by Ordinance No. 1991, N.S., effective December 4, 1979.)

§13-1103. APPLICATION. Persons wishing to pay in lieu fees shall file an application therefor, on forms provided by the License Collector; and a statement of gross receipts. Said documents shall be confidential as to third parties.

§13-1104. GROSS RECEIPTS. "Gross Receipts" except as otherwise specifically provided, shall mean the gross receipts of the preceding fiscal year of the licensee or part thereof, as is defined as follows:

> The total amount actually received or receivable from all sales; the total amount or compensation actually received or receivable for the performance of any act or service, of whatever nature it may be, for which a charge is made or credit allowed, whether or not such act or service is

done as a part of or in connection with the sale of materials, goods, wares or merchandise; and gains realized from trading in stocks or bonds, interest discounts, rents, royalties, fees, commissions, dividends or other emoluments, however designated. Included in "gross receipts" shall be all receipts, cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, interest paid or payable, or losses or other expenses whatsoever, except that the following shall be excluded therefrom:

(a) Cash discounts allowed and taken on sales.

(b) Credit allowed on property accepted as part cf the purchase price and which property may later be sold, at which time the sales price shall be included as gross receipts.

(c) Any tax required by law to be included in or added to the purchase price and collected from the consumer or purchaser.

(d) Such part of the sale price of property returned by purchaser upon rescission of a contract of sale as is refunded either in cash or by credit.

(e) Receipts of refundable deposits, except that such deposits when forfeited and taken into income of the business shall not be excluded.

(f) Amounts collected for others where the business is acting as an agent or trustee to the extent that such amounts are paid to those for whom collected, provided the agent or trustee has furnished the Bureau of Licenses with the names and addresses of the others and the amounts paid to them. This exclusion shall not apply

to any fees, percentages, or other payments retained by the agent or trustee.

(g) Cash value of sales, trades or transactions between departments or units of the same business.

(h) Transactions between a partnership and its partners.

(i) Receipts from services or sales in transactions between affiliated corporations. An affiliated corporation is a corporation: (1) The voting and nonvoting stock of which is owned at least 80% by such other corporation with which such transaction is had; or (2) which owns at least 80% of the voting and nonvoting stock of such other corporation; or (3) at least 80% of the voting and nonvoting stock of which is owned by a common parent corporation which also has such ownership of the

corporation with which such transaction is had.

(j) Receipts from investments where the holder of the investment receives only interest and/or dividends.

(k) Receipts derived from the occasional sale of used, obsolete or surplus trade fixtures, machinery or other equipment used by the licensee in the regular course of the licensee's business.

§13-1105. IN LIEU TAX SCHEDULE. In lieu taxes shall be assessed according to the following schedule:

(a) Retail Sales:

(1) Every person engaged in the business of selling any goods, wares or merchandise at retail shall pay an annual license fee of 60 cents for each thousand dollars of gross receipts.

(2) For the purpose of this section, "a retail sale" or "sale at retail" means a sale of goods, wares or merchandise for any purpose other than resale in the regular course of business.

(b) Grocer:

(1) Every person engaged in business as a grocer shall pay a license fee of 30 cents for each thousand dollars of gross receipts.

(2) The term "grocer" shall include any business in which the principal activity of the business consists of the sale of foodstuffs intended for human consumption, but shall not include restaurants or any other business where food products are prepared on the premises for immediate consumption.

(c) Automobile Dealers: Every person engaged in the business of selling new or used motor vehicles at retail shall pay a license fee of 30 cents for each thousand dollars of gross receipts.

(d) Wholesale Sales.

(1) Every person engaged in the business of selling any goods, wares or merchandise at wholesale shall pay an annual license fee of 60 cents for each thousand dollars of gross receipts.

(2) For the purpose of this section, "a wholesale sale" or "sale at wholesale" means a sale of goods, wares or merchandise for the purpose of resale in the regular course of business.

(e) Business and Personal Services.

(1) Every person engaged in the business of providing business or

personal services shall pay a license fee of 90 cents for each thousand dollars of gross receipts for services performed within the City of Alameda.

(2) "Business and personal services" means any business providing services, repairs or improvements to or on real property, renting or leasing personal property to businesses or persons, or providing services to persons such as, but not limited to laundries, cleaning and dyeing, shoe repair, barber and beauty shops and photographic studios.

(f) Professional--Semi-Professional--Connected Business.

(1) Every person engaged in any business enumerated in Section 13-194, or any combination thereof, shall pay an annual

license fee of $1.80 for each thousand dollars of gross receipts for services performed within the City of Alameda.

(2) Nothing in this section contained shall be deemed or construed as applying to any person engaged in any of the professions or occupations hereinbefore enumerated, solely as an employee carrying on such business in the City of Alameda.

(3) Any person subject to a license under provisions of this section may exclude from gross receipts the portion of those receipts paid to subcontractors, providing that a list of such subcontractors and the amounts of payment is reported to the Bureau of Licenses.

(g) Recreation and Entertainment.

(1) Every person engaged in the business of providing entertainment, recreation, or amusement shall pay an annual license fee of $2.25 for each thousand dollars of gross receipts.

(2) The business of providing entertainment, recreation, or amusement shall include, but is not limited to the following: theatrical or musical entertainment, all shows or exhibits, exhibiting motion pictures, sports and athletic exhibition or contest, pool or billiard room, bowling alley, golf course, circus, penny arcade.

(h) Construction Contractors.

(1) Every person conducting, carrying on a business who is licensed as a contractor by the State

of California and who undertakes to, or offers to undertake to, or purports to have the capacity to undertake to, or submit bids to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, is defined as a contractor. The term contractor as used in this section also includes subcontractor and specialty contractor. Every contractor shall pay an annual license fee of 90 cents for each thousand dollars of

gross receipts for work engaged in at sites within the City of Alameda.

(2) Any person subject to a license under provisions of this section may exclude from gross receipts the portion of those receipts paid to subcontractors, providing that a list of such subcontractors and the amounts of payment is reported to the Bureau of License.

(i) Manufacturing.

(1) Every person engaged in the business of manufacturing or processing any goods, wares, merchandise, article substance or commodity at a fixed place of business within the City of Alameda shall pay an annual license fee of 60 cents for each thousand dollars of gross receipts less

the value of raw materials, or the value of the partially completed product at the time it enters the manufacturing process within the City.

(2) Whenever (i) there are no gross receipts because the manufacturing process within the City of Alameda does not result in a finished product, (ii) where it is shown to the satisfaction of the Bureau of Licenses that the licensee's present method of accounting, using generally accepted principles of accounting consistently applied, does not permit it to determine gross receipts, (iii) where the cost of raw material cannot be determines, or (iv) the final product consists principally of raw materials or component parts

manufactured elsewhere by the licensee, the following alternate method of calculating gross receipts under this section shall be used:

The total of all expenses incurred in the manufacturing process at the business location within the City of Alameda for payroll, utilities, and rent.

(3) A business taxed under this section shall not be considered either a retailer or wholesaler with respect to the sale of goods manufactured by such business within the City of Alameda.

(j) Administrative Headquarters.

(1) Every person conducting or carrying on the operation of an administrative headquarters shall pay a license fee of 60 cents for

each thousand dollars of gross payroll of all persons employed by the business at such administrative headquarters.

(2) "Administrative Headquarters" shall mean a location where the principal business transacted consists of providing administrative or management-related services such as, but not limited to, record keeping, data processing, research, advertising, public relations, personnel administration, legal and corporate headquarters services, to other locations where the operations of the same business are conducted which lead more directly to the production of gross receipts.

(3) A business shall be taxed as an administrative headquarters if

the number of employees engaged in administrative activities exceeds the total number of employees engaged in activities at the same location which would be otherwise taxable under this article. The gross payroll on which the license fee is to be computed shall include those employees engaged in those activities otherwise taxable under this article.

(4) "Gross Payroll" shall mean and include the total gross amount of all salaries, wages, commissions, bonuses, or other money payment of any kind which a person received from or is entitled to receive from or be given credit for by his employer for any work done or personal service rendered in any trade,

occupation or profession, including any kind of deductions before "take home" pay is received; but shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by the employee to the employer.

(k) (Repealed by Ordinance No. 1871 N.S., effective July 8, 1977.) (Rental of Commercial and Residential Property)

(l) Miscellaneous Business. Any person engaged in a business not specifically taxed by other Business License Tax provisions of this article and not otherwise exempted shall pay an

annual license fee of 60 cents for each thousand dollars of gross payroll.

§13-1106. MINIMUM TAX. The fee required under this article shall not be reduced by the application of this article to less than Thirty Dollars ($30.00) in cases where the fee would otherwise exceed Thirty Dollars ($30.00).

SECTION 7. CREDIT FOR EXISTING LICENSES. Any person required to obtain a license and pay a license tax under the provisions of this ordinance, who is now paying a license fee to the City of Alameda under the provisions of any other ordinance of the City of Alameda, shall receive credit on the amount of the license tax imposed by this ordinance for the amount paid for such other license or licenses prorated on the basis of the number of months remaining in the term for which such other license was issued. In the event that the amount of the license fee now

being paid to the City of Alameda under the provisions of such other ordinance or ordinances is larger than the amount which would be required to be paid under the provisions of this ordinance, then and in that event the amount of the license tax shall be the amount of the license fee or fees paid under such other ordinance or ordinances.

SECTION 8. PURPOSE. The purpose of this ordinance is to license for revenue.

SECTION 9. REPEAL. All ordinances or parts of ordinances in conflict herewith, are hereby repealed.

SECTION 10. VALIDITY OF ORDINANCE. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this ordinance, and the council of the City of Alameda hereby declares that it would have passed this ordinance and each section, subsection, sentence,

clause and phrase thereof, irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared invalid or unconstitutional. (Article 10 is added by Ordinance No. 1800 N.S., effective May 7, 1976.)

NOTE: Sections 7 through and including 10, are added and numbered verbatim from Ordinance No. 1800 N.S.

APPENDIX E

ORDINANCE NO. 2096

AN ORDINANCE OF THE CITY OF ALAMEDA GRANTING A NON-EXCLUSIVE FRANCHISE TO UNITED CABLE TELEVISION OF AMERICA, INC. FOR THE INSTALLATION, CONSTRUCTION, OPERATION AND REGULATION OF A CABLE TELEVISION SYSTEM FOR ALAMEDA

THE CITY OF ALAMEDA ORDAINS AS FOLLOWS:

SECTION 1. Short Title. This Ordinance shall be known and may be cited as the "Alameda Cable Television Franchise Ordinance with United Cable Television of Alameda, Inc."

SECTION 2. Grant of Franchise. This Ordinance is enacted pursuant to the authority provided in, and all the provisions, terms and conditions of Ordinance No. 2065, titled Alameda Cable Communications Ordinance, passed and adopted on August 4, 1981, copies of which are on file in the office of the City Clerk. The franchise herein granted shall include the provisions of said Ordinance; the Request for CATV Proposal approved by the City Council July 21, 1981, the franchise application dated Octo-

ber 23, 1981 by United Cable Television of Alameda Inc. to the City; the City of Alameda Resolution No. 9770 setting rates and charges; and the City of Alameda Resolution No. 9769 establishing rules and regulations and standards of operation, all of which are incorporated herein by reference and made a part hereof. The franchise requested from the City by United Cable Television of Alameda, Inc. to install, construct and operate a cable television system is hereby granted as herein provided.

SECTION 3. Franchise General Terms and Conditions. United Cable Television of Alameda, Inc., hereinafter referred to as Grantee, is hereby granted a non-exclusive franchise for a period of fifteen (15) years from the date of acceptance of this franchise on the terms and conditions hereinafter set forth.

(a) The Franchise herein granted shall be subject to all of the terms and conditions of this Ordinance and other documents

comprising the franchise as set forth in Section 2 hereinabove. In the event of any conflict between the provisions of this Ordinance and documents comprising the franchise as set forth in Section 2, the provisions of this Ordinance will prevail.

(b) Grantee shall build, construct and operate a cable television system to serve the entire City of Alameda in full compliance herewith.

.....

SECTION 16. Franchise Fee.

(a) In consideration of the granting and exercise of a franchise as defined in Section 3, of Ordinance No. 2065, for the operation of a cable television system, the Grantee shall pay to the City during the life of the franchise, a franchise fee of three percent (3%) of the Grantee's annual gross revenues as defined in Subparagraph (a), Section 12, of Ordinance 2065. Said fee shall be in addition to the two percent (2%) fee established by Section 13(f)(iii).

(b) The franchise fee payments shall be made to the City Treasurer quarterly based on estimated revenues with a final year-end payment to be submitted with financial statement within forty-five (45) days of the end of Grantee's fiscal year, reflecting any adjustments of the quarterly estimated payments. All described payments are due within forty-five (45) days of the end of the subject period.

(c) Upon two working days' notice, the Grantor shall have the right to inspect all books, records, maps, plans, financial statements, and other like material of the Grantee at any time during normal business hours and at Grantee's facilities.

APPENDIX F

CITY OF ALAMEDA ORDINANCE NO. 2065 N.S.
New Series

AN ORDINANCE OF THE CITY OF ALAMEDA RELATING TO THE CONSTRUCTION, OPERATION, REGULATION AND CONTROL OF CABLE COMMUNICATIONS SYSTEMS WITHIN THE CITY'S TERRITORIAL LIMITS AND REPEALING ORDINANCE NO. 2043 N.S. RELATING TO CABLE COMMUNICATIONS SYSTEMS

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALAMEDA that:

Section 1. Short Title. This Ordinance shall be known and may be cited as the "Alameda Cable Communications Ordinance."

Section 2. Definitions. Unless it is apparent from the context that it has a different meaning, each of the following words and phrases has the meaning herein stated wherever it is used in this franchise. When not inconsistent with the context, words used in the plural number include the singular number, and words in the singular include the plural number.

2.1 APPLICANT: Any person or corporation submitting an application for a cable communications franchise.

2.2 BASIC SERVICE: That service regu-

larly provided to all subscribers at a basic monthly rate including, but not limited to, the retransmission of local and distant broadcast television signals, non-premium satellite services, automated services, local origination and access services.

2.3 CABLE COMMUNICATIONS SYSTEM OR CATV SYSTEM: A system employing antennae, microwave, wire, wave-guides, coaxial cables, or other conductors, equipment or facilities, designed, constructed or used for the purpose of:

2.3.1 collecting and amplifying local and distant broadcast television or radio signals and distributing and transmitting them;

2.3.2 transmitting original cablecast programming not received through television broadcast signals;

2.3.3 transmitting television pictures, film and video-tape programs, not received through broadcast television sig-

nals, whether or not encoded or processed to permit reception by only selected receivers.

2.3.4 transmitting and receiving all other signals: digital, voice, audio-visual, or other forms of electronic or electrical signals.

.....

Section 12. Compensation and Guarantee to the City.

12.1 FRANCHISE FEE:

(A) In consideration of the granting and exercise of a franchise to construct and operate a cable communications system in the City, the Grantee shall pay to the City during the life of the franchise, a franchise fee equivalent to a percentage, as stipulated in the franchise ordinance, of the Grantee's gross revenues including, but not limited to, Basic Service Revenues, Non-Basic Revenues, Advertising Revenues, Lease Revenues, and Data expenses associated with the conduct and performance of the City's authority, responsibilities, and

police power in the promotion of safety, convenience, comfort, prosperity, and general welfare of the citizens of the City, and in consideration of the City's granting and Grantee's exercising a franchise to use the streets, as defined in Section 2 herein.

(B) The percentage payments shall be made in the manner, amounts and at times directed in the franchise ordinance.

(C) Each payment shall be accompanied by a statement, in duplicate, verified by the Grantee or by a general officer or other duly authorized representative of the Grantee, showing in such form and details as the Council may require from time to time the facts material to a determination of the amount due.

(D) The City or its representative shall have the right to inspect the Grantee's records to determine if proper payments have been made to the City. The cost of such audits shall be borne by Grantee if the same results in increasing, by more than

2%, the Grantee's annual payment to the City.

(E) No acceptance of any payment shall be construed as a release or as an accord and satisfaction of any claim the City may have for further or additional sums payable under this Ordinance, or the Franchise Ordinance or associated Resolution or Ordinance for the performance of any other obligation thereunder.

(F) The payment made to the City by the Grantee pursuant to this section for any calendar year shall be in lieu of any license fee or business tax, prescribed by the City for the same period, but only to the extent of such payment.

(G) At the discretion of the Council, a percentage or portion of the fee payments may be ear-marked to assist in the funding of certain non-basic service, e.g., public and educational access, etc.

84-602

No.

Office - Supreme Court, U.S.
FILED
NOV 14 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF ALAMEDA, a municipal corporation,
Petitioner,

vs.

PREMIER COMMUNICATIONS NETWORK, INC.,
a California corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AFTER JUDGMENT OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE OF THE STATE OF CALIFORNIA

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14pp

TABLE OF CONTENTS

PAGE

I. RESPONDENT'S STATEMENT OF THE CASE..... 1

II. SUMMARY OF REASONS WHY PETITION SHOULD BE DENIED..... 3

III. ARGUMENT..... 6

A. Respondent Is A Disseminator Of Protected First Amendment Expression..... 6

B. If Revenue-Raising Is The Only Purpose, There Can Be No Justification For Differential Tax Treatment Of A First Amendment Business..... 7

C. This Care Clearly Involved Differential Treatment As To Taxing Methods..... 7

D. A Differentially Burdensome Rate Is Also Forbidden, And Was Involved In This Case..... 8

IV. CONCLUSION.....11

TABLE OF AUTHORITIES

	PAGE(S)
46 F.C.C.2d 175, 203 (1974)	1
Arnke v. City of Berkeley, 185 Cal.App.2d 842 (1960)	10
City of Los Angeles v. Taxpayers for Vincent, --U.S.--, 104 S.Ct 2118 (1984)	5
Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, --US -- 75 L.Ed.2d 295 103 S.Ct. 1365, 1372 n.7 (1983)	3, 4 passim
Weaver v. Jordan, 64 Cal.2d 235 (1966) cert. denied 385 U.S. 844 (1966)	6

STATUTES AND LAWS

City of Alameda Municipal Code §13-133	5
City of Alameda Ordinance No. 1991	2, passim
United States Constitution, First Amendment	passim

I. RESPONDENT'S STATEMENT OF THE CASE

Petitioner City of Alameda has made extraneous and often erroneous factual assertions in its Statement of Facts (and its Petition in general).[1] These often outside-the-record comments should be disregarded.[2]

A review of the relevant facts need go no further than the Ordinance at issue

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1/ For example, several of the factual assertions at pages 5 to 7 of the Petition are incorrect, and argumentative misstatements like "the tax will not in fact inhibit Premier's business" (Pet., at 11) (emphasis in original) simply have no place in a Petition for Certiorari. However, since the Statement of Facts contained in the Court of Appeal's opinion is accurate and more than adequate, Respondent Premier will simply rely on the lower court's statement.

2/ For example, by analogizing to cable television "franchise fees," the Petitioner repeatedly attempts to create the impression that its tax is not so out-of-line. However, fees are not taxes; fees are to defray the cost of administering street use, not contributions "to the general fund," as Petitioner wrongly asserts at page 7 of its Petition. See, e.g., 46 F.C.C.2d 175, 203 (1974). Premier makes no use of the streets. All of Petitioners remarks about cable television are irrelevant to the issues decided below. See A-22 n.9.

(Ordinance No. 1991) and the City's Municipal Code. As the Court of Appeal's careful analysis of the City's tax scheme reveals, Ordinance No. 1991 imposed upon a small group of target First Amendment firms a method of taxation which differed significantly from that imposed upon "any other business in the City," whether or not said other business was a First Amendment business (A-16).The Court of Appeal then went on to further point out that this case not only involves tax treatment which was differential in its method, but also burdensomely differental because Ordinance No. 1991 imposed a tax rate which was much higher than that borne by any other business (generally speaking, 13 times greater, or $6,300.00/year for Respondent Premier versus a maximum of $472.50/year for virtually all other businesses. A-17; B-2).[3/]

3/ Actually, the disparity was even more gross, since most businesses pay an annual business license tax of less than $100 under the "in lieu" scheme, and even the few businesses which, like Premier, were excluded from taking advantage of the "in lieu" scheme, nonetheless operated under a different method of taxation than Premier, and also paid a significantly lower rate. A-18 & n.18.

In other words, this is a clear case of an Ordinance which went out of its way to expressly single out just one type of First Amendment business for blatantly differential tax treatment, both as to the method of taxtion, and as to the rate.

II. SUMMARY OF REASONS WHY PETITION SHOULD BE DENIED

1. This is a case "arising directly under the First Amendment" (Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, ___U.S.___, 75 L.Ed.2d 295, 103 S.Ct. 1365, 1372 n.7 (1983)), and no Equal Protection or Due Process issues were discussed or decided below. Therefore, the City's protestations that "Equal Protection and Due Process doctries" are being overruled, "sub silentio" (Pet. at 9) or otherwise, are meritless.

2. The Petition is based primarily on a massive conception: to wit, that Minneapolis Star, supra, only forbids differential methods

of taxation whereas the Court of Appeals below dealt only with differential rates of taxation. In fact, the Court of Appeal below first concluded that, like the state law in Minneapolis Star, supra, Ordinance No. 1991 impermissibly imposed a differential method of taxation. The Court of Appeal below then further pointed out that, in this case, differential treatment as to the method of taxation also resulted in a high degree of "differentially more burdensome treatment," a concern which the Minneapolis Star Court also shared. See, 103 S.Ct. at 1374-75 & n.13.

3. The Petitioner's "prior restraint" arguments are misplaced; Minneapolis Star does not require a showing of prior restraint.[4/] It is the act of differential tax treatment itself which, because it creates a potential chill on First Amendment activities, cannot be tolerated under the First Amendment. See, e.g., 103 S.Ct. at 1374-75.

4/ Indeed, except in footnotes 6 and 9, to illustrate other points, the Minneapolis Star Court appears to not have used the phrase at all.

4. The Petition also overlooks Part V of the Minneapolis Star opinion, which condemns a "tax...that...singles out a few members of the press" even more strongly than a tax scheme which singles out the press in general for differential treatment. In the instant case, therefore, Ordinance No. 1991 is invalid for the additional reason that, as the Court of Appeal noted, it expressly singles out just one small segment of the media for its harsh differential treatment.

5. The Petitioner's reliance upon City of Los Angeles v. Taxpayers for Vincent, __ U.S.___, 104 S.Ct 2118 (1984) is misplaced. Vincent involved non-revenue regulation of First Amendment activitiy, not differential taxation "for municipal revenue purposes only." Pet. at 6 (also quoting the City's Municipal Code, which expressly declares that the taxs at issue "are not regulatory fees" §13-133).

III. ARGUMENT

A. Respondent is a Disseminator of Protected First Amendment Expession

The City apparently now concedes that Respondent Premier, as a disseminator of news, information and entertainment, is indeed a First Amendment business engaged in the dissemination of protected First Amendment expression. See, e.g., Weaver v. Jordan, 64 Cal.2d 235 (1966), cert. denied 385 U.S. 844 (1966). "[T]he general principles of the First Amendment" (Minneapolis Star, supra, 103 S.Ct. at 1369) thus apply to any municipal tax scheme imposed upon Respondent Premier. Equal Protection and/or Due Process considerations are unrelated to an inquiry into whether the tax scheme is invalid "directly under the First Amendment." Id. at 1372 n.7.

B. If Revenue-Raising Is The Only Purpose, There Can Be No Justification For Differential Tax Treatment Of A First Amendment Business

In the present case, the City simplified matters greatly by explicitly declaring in Ordinance No. 1991 (at §3) that "[T]his Ordinance is adopted for revenue purposes only." A-4

As this Court made clear just last year in Minneapolis Star, supra, revenue-raising, "standing alone" (as it does in this case) cannot justify the special treatment of the press," because the less burdensome alternative of "taxing business generally" to "raise the revenue" is always available. Id. at 1372. Accordingly, if there is differential treatment, Ordinance No. 1991 violates the First Amendment, and is unconstitutional.

C. This Case Clearly Involved Differential Treatment As To Taxing Methods

We turn first to the question of taxing methods (as opposed to "rates"). There is no

issue in this case about whether the Petitioner City has imposed a different method of taxation upon Premier (and, indeed, on subscription television as opposed to other members of the media). It has. See A-13 to A-18.

The City tries to mask this fact by simply making the bold statement that it does not have differing methods of taxing businesses.[5/] This erroneous position was firmly and properly rejected by the Court of Appeal. See, e.g., A-14 n.4.

Demonstrably, the Court of Appeal below was not just comparing "differences in tax liabilities," as Petitioner incorrectly asserts at page 14 of its Petition, but was instead expressly concentrating firstly on the "variety of methods" used by the City to tax businesses.

5/ Accordingly, this Court expressly pointed out that economic regulation was permissible, but only when it involved "the general applicability of the challenged regulation to all businesses." 103 S.Ct. at 1376.

A-14 (emphasis added). Since Ordiance No. 1991 singled out one member of the media for a method of taxation different "from any other business in the City" (A-16), there were differential taxing methods involved, the First Amendment was violated, and the inquiry could have ended there.

D. A Differentially Burdensome Rate Is Also Forbidden, And Was Involved In This Case

This case also involves an example of a local government targeting one type of First Amendment business for a tax rate which was dramatically higher than that paid by any other business. See, e.g., A-17 to A-18. Such a tax scheme is also differential treatment directly violative of the First Amendment. See, e.g., Minneapolis Star, 103 S.Ct. at 1372-74.

The Petitioner apprently disagrees. In asking the Court to uphold Ordinance No. 1991, the Petitioner City in effect argues that the First Amendment is not offended by Ordinances which subject a narrow group of First Amendment

businesses to a burdensome tax rate; indeed, to a rate which was significantly higher than the rates applied to any other business. This position conforms to neither the law nor common sense.

When the Minneapolis Star Court stated that government cannot tax First Amendment businesses differentially solely to raise revenue -- because it could raise the same amount of revenue by taxing all "businesses generally" (103 S.Ct. at 1372) -- it obviously was not authorizing government to tax the press at a rate higher than all others.[6/] The press should pay its fair share, but not more than its fair share. Indeed, one of the reasons the Court condemned differential methods of taxation was that the "extra burden" of a differentially higher rate would not "escape detection by the Courts." 103 S.Ct. at 1375 n.13.

6/ This takes the form of a curious "nexus" argument. Petitioner has misapplied the nexus doctrine, which has to do with whether there are sufficient contacts with the taxing authority to constitutionally justify taxation. See, e.g., Arnke v. City of Berkeley, 185 Cal.App.2d 842 (1960).

VI. CONCLUSION

The decision below is a narrow and straight forward application of Minneapolis Star, supra. This present case shows that the result in Minneapolis Star was sound. In Minneapolis Star, the State had argued that its differential tax treatment should be upheld because it was actually favorable to the press. This Court rejected that argument, reasoning that even favorable differential treatment can quickly lead to oppressive and burdensome tax rates as governments seek new sources of revenue. The differentially burdensome tax method and rate imposed by the City of Alameda upon Premier reveals that this Court's concern was well founded. Therefore, Respondent Premier respectfully submits that the Petition of the City of Alameda should be denied.

Respectfully submitted,

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No. 84-602

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF ALAMEDA, a municipal corporation,
Petitioner,

vs.

PREMIER COMMUNICATIONS NETWORK, INC.,
a California corporation,
Respondent.

REPLY BRIEF

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TABLE OF CONTENTS

I

Page

The record 1

II

Respondent's rationales do not serve First Amendment purposes 3

III

Conclusion 6

TABLE OF AUTHORITIES CITED

Cases

Arnold Transit Co. v. City of Mackinac Island (1980) 99 Mich.App. 266; 297 N.W.2d 904 2

Chemline, Inc. v. City of Grand Prairie (5th Cir. 1966) 364 V.2d 721 4

Cox v. State of New Hampshire (1941) 312 U.S. 569, 576; 61 S.Ct. 762 4

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue (1983) 460 U.S. 757, 103 S.Ct. 1365 ..... 3, 4, 5,6

Constitution

United States Constitution, First Amendment 5. 6

Statute

Cable Franchise Policy and Communications Act of 1984, Section 622(b) 1, 2

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REPLY BRIEF

I

THE RECORD

The record clearly does not provide any indication that the tax can or will inhibit the growth of respondent's business. R.B., ft.nt.1. In addition to the FCC and California determinations (Petition pp. 11-12) that a fee charged by local government equal to 5% of subscription television's gross revenues will not inhibit the growth of that industry, Congress has just adopted the "Cable Franchise Policy and Communications Act of 1984." S.B. 66 and H.B. 4103.[1] This Act adds cable to the Communications Act of 1934. Section 622(b) authorizes a 5% franchise fee. The FCC's

[1]The President has signed the bill.

prior determination is now national policy. The tax rate cannot be characterized as "burdensome" or "harsh" without resorting to a comparative analysis which measures the impact of the tax rate by the absence of its application to others. R.B. pp. 2 and 5. That procedure is irrelevant to the rate's actual impact on respondent.

Respondent seeks to avoid national policy by discrediting the analogy between cable subscription television and non-cable (MDS) subscription television. According to respondent, franchise fees are not general fund revenues. R.B., ft.nt.2. That is not true. The tax, in fact, also applies to cable television. Pet. p.7. Cable simply can pay *either* the tax or the franchise, but need not pay both (pay twice). Pet. p.7. In *either* event the money goes to the general fund. As a matter of common law franchises produce general revenue. *See, Arnold Transit Co. v. City of Mackinac Island* (1980) 99 Mich.App. 266; 297 N.W.2d 904-906. The FCC acknowledges that its justification for franchise fees is fictional. "Very little actual regulation on a day-to-day basis goes on after" start up. 46 F.C.C.2d 175, 203. The FCC limited franchise fees in the first place because cities were using them to raise too much "revenue". 36 F.C.C.2d 143, 209. Franchise fees and taxes go to the same general fund to pay for exactly the same items, such as street maintenance and everyone's salaries. The record does not indicate that any special funds are involved. Congress did not find it necessary to create any legal fiction that franchise fees are not general revenues. § 622(b). No such legal fiction *ever* existed. The FCC merely adopted a rationale for limiting franchise fees. Characterizing the use of revenue by the City serves no useful purpose.

The court of appeal did not address itself to *methods* of taxation. Only the burden of the rate is discussed. R.B., p.2.

The record does not indicate that the maximum tax for most businesses is $472.50. R.B., p.2. The court of appeal was merely making a comparison of this tax rate to the in lieu tax *rate,* if applied to respondent.

The record does not justify the tax rate on the basis of revenue purposes only (standing alone). R.B. p.7. Respondent treats tax *nexus* and tax *rates* as synonymous. The tax is a revenue measure. Differences in rates have other purposes behind them as well.

II

RESPONDENT'S RATIONALES DO NOT SERVE FIRST AMENDMENT PURPOSES

We are somewhat shocked at respondent's assertion that this case has nothing to do with prior restraints. R.B., p.4. We have always considered "censorship" and "prior restraints" (at least conceptually) synonymous terms. *Minneapolis Star*[2] discusses the seminal prior restraint cases in reaching its decision. The term "prior restraint" was unnecessary because the Court, for the most part, addresses potential censorship.

Respondent's arguments lack the stated premises necessary for their clear understanding. The one on page 7, in particular, tortures the imagination. Revenue ordinances

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[2]*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* (1983) 460 U.S. 757, 103 S.Ct. 1365.

and police power ordinances treat fees differently. Pure revenue fees (taxes) have no cost of service limitation. Pet., p.9. Fees for the administration of regulatory permits cannot exceed the actual cost applicable to the permittee of administering the (police power) permit system. *See, Cox v. State of New Hampshire* (1941) 312 U.S. 569, 576; 61 S.Ct. 762, 766 and *Chemline, Inc. v. City of Grand Prairie* (5th Cir. 1966) 364 V.2d 721, 727. Consequently, and particularly under California law, business license ordinances contain the revenue only *statement* to insure that they are not subjected to the police power license rule. Respondent assimilates that *statement* to the Court's discussion in regard to satisfying the burden of proof, when shifted (revenue purpose alone insufficient), and concludes that a differential tax rate falls within the *Minneapolis Star* rule. This, at best, *non-sequiture* assumes that the Constitution now requires uniform rates as a condition of taxing first amendment businesses. Stated another way, a differential rate raises a presumption of censorship which requires the taxing agency to show a compelling state interest for a *rate* that does not apply to "business generally". Respondent employs the unstated premise that rates and *nexus* are synonymous, or stated another way, that "burden" is created by either a tax or a tax rate, equally under the Constitution. We believe that those burdens differ constitutionally.

A similar semantic manipulation appears in the next argument. R.B., pp. 7-9. We use "method" and "nexus" synonymously.[3] Respondent uses "method" and "rate" as syn-

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[3]*Nexus* is an awkward term.

onymous terms instead. That stratagem turns our arguments upside down, justifies the court of appeal's error in analysis of burden (which also fails to distinguish rates from *nexus*) and makes "differential treatment," as used in *Minneapolis Star, appear* applicable to rates. Again, the premise assumes the conclusion.

In its final argument respondent, finally, drops its semantic veil and agrees, albeit unwittingly, with us on the real issue in this case. R.B. pp. 9-10. "The press should pay its fair share, but not *more* than its fair share." R.B., p.10. The issue for this Court is: *Who* decides what is their fair share, and how? The courts have *never* made that decision. The "common sense" and "the law" of the Congress of the United States holds that 5% is a fair share for subscription television. Respondent, and the court of appeal have resolved the matter by requiring, *sub silencio,* uniform tax rates. The censorial impact of a tax *rate,* if it exists under the First Amendment, should be a question of fact, as it is under Equal Protection. If the Court adopts, as a premise, the position that differential tax rates are burdensome to the exercise of the First Amendment, only uniform rates will succeed. The fair share burden of proof would prove too expensive a task for agencies and too difficult a task for the courts.

III
CONCLUSION

The bottom line approach of respondent (financial burden) indicates that their concern is *equal treatment,* not censorship. The review of tax rates should be left to Equal Protection and Due Process analysis. Nothing in *Minneapolis Star* justifies the constitutional imposition of uniform or "fair share" tax rates. If the First Amendment is to apply to tax rates, that decision should come from this Court, not from the confusion of a lower court. Certiorari should be granted.

November 20, 1984

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